

1 UNITED STATES BANKRUPTCY COURT

2 EASTERN DISTRICT OF NEW YORK

3 Case No. 14-72941-LAS

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5 In the Matter of:

6
7 GERSHON BARKANY,

8
9 Debtor.

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12
13 U.S. Bankruptcy Court

14 Alfonse M. D'Amato Federal Courthouse

15 290 Federal Plaza

16 Central Islip, New York 11722

17
18 November 13, 2014

19 10:54 AM

20
21 B E F O R E :

22 HON LOUIS A. SCARCELLA

23 U.S. BANKRUPTCY JUDGE

1 A status conference to determine the status of discovery,
2 schedule an evidentiary hearing, and any other matter that
3 may affect this proceeding. [51]
4

5 Motion for 2004 Examination / Motion of the Petitioning
6 Creditors and Contingent Barkany Creditors Pursuant to
7 Federal rule of Bankruptcy Procedure 2004, 9006 and 9016
8 Directing Production of Documents by Barkany Asset Recovery
9 and Management, LLC. Filed by Lester M. Kirshenbaum on
10 behalf of Joseph Rosenberg (Entered: 10/08/2014) [57]
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25 Transcribed by: Sherri L. Breach & Dawn South

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P R O C E E D I N G S

THE COURT: All right. The matter of Gershon Barkany. The first matter is a status conference. Where is Mr. Januzzi?

UNIDENTIFIED SPEAKER: Your Honor, I was just about to say I -- I don't think he's here.

THE COURT: Well, why don't we give him a few minutes to arrive?

(Recess taken at 11:06 a.m.; resume at 11:19 a.m.)

THE CLERK: -- Scarcella presiding.

THE COURT: Thank you. Good morning.

MR. JANUZZI: Good morning, sir.

THE COURT: Please be seated.

All right. May I have the appearances of counsel, please?

MR. JANUZZI: For Mr. Barkany, it's Michael Januzzi, 775 Park Avenue, Huntington, New York. Good morning, sir.

MR. WASSERMAN: For BARM, Allen Wasserman and Shalom Jacob, Locke Lord. Good morning.

MR. SCHNECK: For the Canadian Northern Creditors, Joel Schneck from Goldberg, Rimberg & Friedlander.

MR. KLAUSNER: For petitioning creditors, Borgata Marina District Development Company, LLC, Jeremy Klausner, Agostino & Associates.

1 MS. LEVINE-SHAPIRO: For petitioning creditors,
2 Saul Kessler, Lisa Levine-Shapiro, Law Office of Kramer &
3 Shapiro, P.C.

4 MR. KIRSHENBAUM: Good morning, Your Honor.
5 Lester Kirshenbaum along with Jonathan Agudelo from Kaye
6 Scholer on behalf of petitioning creditors Joseph Rosenberg.

7 THE COURT: Thank you.

8 The first --

9 MR. MULHOLLAND: Judge, Mark -- Judge, Mark
10 Mulholland --

11 THE COURT: I'm sorry.

12 MR. MULHOLLAND: That's all right, Judge. Mark
13 Mulholland of Ruskin Moscou on behalf of contingent
14 creditors Jonathan Leifer, Murray and Sarah Leifer, and Ed
15 Lowy.

16 MR. WARREN: Edward Warren from Voute, Lohrfink,
17 Magro & McAndrew for contingent creditors Steven Kwestel &
18 (indiscernible).

19 THE COURT: Thank you.

20 Anyone else?

21 All right. I'm free to proceed.

22 The first matter is the status conference and
23 there are a couple of issues that I want to deal with with
24 respect to the status conference, including the supplemental
25 pleading that was filed yesterday or maybe the day before on

1 behalf of the Borgata in other opposition to the debtor's
2 motion to dismiss.

3 But before we get to that, maybe I can hear from
4 Mr. Januzzi as to where things stand with the Office of the
5 United States Attorney. The last time we were gathered
6 here, we were talking about a mechanism or a procedure by
7 which we would try and capture the universe of claims. And
8 there was going to be an exchange of information,
9 discussions with the U.S. Attorney's Office.

10 So, Mr. Januzzi, if you can address that.

11 MR. JANUZZI: Thank you, Your Honor. I --

12 THE COURT: And if others obviously wish to
13 address that, I'm happy to hear that as well. But I'm
14 curious as to where we stand with this whole concept of the
15 universe of claims.

16 MR. JANUZZI: I believe the last time we were here
17 the U.S. Attorney's Office said that they would actually
18 undertake to provide that information, and I believe they're
19 here today to give that to Your Honor.

20 MS. LEONARDO: If you would rather here from us on
21 it then, Your Honor, that's fine.

22 Diane Leonardo from the U.S. Attorney's Office.

23 Your Honor, we have gotten some affidavits of loss
24 from some of the potential victims. We don't have
25 everything. In some instances we've been provided

1 affidavits, but not backup paperwork, and that would be
2 something that we would need to see.

3 In addition, I have asked several of the counsel
4 to provide us with copies of the complaints that have been
5 filed in this -- in the State Court. And that would be
6 helpful to see, also.

7 THE COURT: All right, because the concept here is
8 to make the determination that all of the victims would be
9 accounted for. And that would be -- we've got this fund
10 being set up and the concept being is that fund should be
11 set up, you know, to account for all of the victims and be
12 compensation for the victims.

13 No one has explained to me the -- here the issue
14 or the interplay between the forfeiture order and the
15 transfer of Mr. Barkany's assets, but if this was solely
16 pursuant to a forfeiture order, then obviously the United
17 States Attorney would -- United States Attorney's Office
18 would be concerned with respect to the universe of claims
19 and compensation to the victims of the fraud.

20 And so really that's what I'm interested in is
21 that have we captured or are we making the efforts to
22 capture the universe of claims and making sure that those
23 who are victims of the fraud receive, you know, whatever pro
24 rata distribution or compensation that they may get from the
25 assets that either were seized and/or transferred from Mr.

1 Barkany over to BARM.

2 MS. LEONARDO: Right. Your Honor, and at this
3 point, I mean, an affidavit really is insufficient. We do
4 need the backup paperwork. I don't know when counsel can
5 get that to us, but obviously sooner rather than later.

6 Just so Your Honor knows, with the forfeiture
7 process, what happens is if the money gets forfeited to the
8 United States, there has to be a remission process and
9 literally Washington has to approve it, and we would need
10 all this paperwork anyway in order to get that done.

11 THE COURT: So I do know that there was a
12 forfeiture order entered and I am familiar with the
13 forfeiture process --

14 MS. LEONARDO: Uh-huh.

15 THE COURT: -- fortunately or unfortunately.

16 But thank you.

17 Does anyone else wish to be heard on this whole
18 aspect of the victims' claims?

19 Mr. Wasserman.

20 MR. WASSERMAN: Very briefly, Your Honor. My
21 understanding was that we were to submit the affidavits of
22 loss along with supporting documentation and that Your Honor
23 gave the parties six weeks to do that. We've submitted
24 affidavits from all of our clients who intend to submit
25 them. They total \$50,602,946. We supplied all of the

1 supporting documentation that we thought was necessary. To
2 the extent that the government required additional
3 documents, we offered to provide them anything else that
4 they needed.

5 What we had thought we would get today was either
6 a list or something from the government in their report
7 explaining, particularly from the parties who are here
8 today, whether they submitted affidavits of loss and the
9 amounts so that we could at least determine the universe
10 among the people who are in this courtroom.

11 And I'm hoping that either Mr. Kirshenbaum on
12 behalf of his clients or the government can tell us at least
13 whether they received all of the documentation they require
14 from the petitioning creditors.

15 THE COURT: Thank you.

16 MR. KIRSHENBAUM: Your Honor, let me just make a
17 couple of points.

18 We did submit an affidavit on behalf of one of our
19 clients, Mr. Rosenberg, the petitioning creditor. And, in
20 fact, the claim that we submitted on -- let me just say this
21 closer to the microphone.

22 The claim that we submitted on behalf of Mr.
23 Rosenberg was in the -- is in the amount of \$479,000 and
24 change. And that is the number that reflects Mr.
25 Rosenberg's loss up to the date of Mr. Barkany's arrest.

1 And the rational for cutting off the affidavit of the loss,
2 which is, of course, loss as a victim as of the date of the
3 arrest was that obviously subsequent to the date of the
4 arrest Mr. Rosenberg was aware of the arrest.

5 And so to the extent that Mr. Rosenberg continued
6 to extend credit to Mr. Barkany subsequent to the date of
7 the arrest to -- as an example, to lend him money to pay the
8 retainer fees for his lawyers and lending him additional
9 monies for living expenses, et cetera, subsequent to the
10 date of the arrest, that is not part of Mr. Rosenberg's
11 affidavit of loss because, as I said, you can't claim that
12 you're a victim because you didn't know what was going on
13 once you know that someone's been arrested.

14 We intend to file a proof of claim in this -- in
15 this court, in this case, within the next one or two
16 business days. That will include the additional amounts
17 advanced by Mr. Rosenberg on Mr. Barkany's behalf for items
18 such as the ones I just mentioned to you up to the date of
19 the bankruptcy filing, which will add another couple of
20 hundred thousand dollars to the claim.

21 And so the claim that we intend to file on the
22 Bankruptcy Court in the next day or so will be in the amount
23 of roughly \$682,000 and change.

24 Let me just -- now further, Your Honor, with
25 respect to the question of additional affidavits of loss we

1 will be filing an affidavits of loss, but -- of contingent
2 loss on behalf of two of our other clients, one Mr. Zelinger
3 (ph), Jonathan Zelinger, who is the brother of Mr. Barkany's
4 mother-in-law, and Mr. Zelinger invested in a number of
5 transactions involving Mr. Barkany.

6 Mr. Zelinger actually -- and this will be in his
7 affidavit of loss -- made a very small amount of money on
8 those investments. I think in total roughly \$100,000 or
9 maybe less. But, of course, he has the contingent claim for
10 loss because he's being sued for 70 million, \$80 million,
11 you know, by the BARM group.

12 And similarly, Your Honor, we're filing a proof of
13 claim, a contingent claim, on behalf of the company which is
14 headed up by Mr. Zelinger. The name of the company is EPI,
15 Ethical Products, Inc. Ethical Products actually was
16 involved in two of the transactions with Mr. Barkany. It
17 didn't make any money. It basically simply got back its
18 principal. But Ethical Products is also being sued for
19 roughly 75, \$80 million by BARM and also by Mr. Schnecksline
20 (ph), I should add as well.

21 So there is a -- there is a contingent loss claim
22 that's going to be filed on behalf of Ethical Products.

23 Finally, Your Honor, a name that has not come up
24 before within the framework of this proceeding because
25 there's been no need to, we represent one additional

1 creditor of Mr. Barkany. His name is Jason Rosenthal (ph)
2 and I apologize, Your Honor. I forget the name of his
3 company. Mr. Rosenthal and his company are actually the
4 sub-lessor to Mr. Barkany when Mr. Barkany leased space in
5 Cedarhurst on -- I believe on Spruce Street. And Mr.
6 Rosenthal actually is being sued by the Canadian Northern
7 Group.

8 But in addition, Your Honor, Mr. Rosenthal was an
9 investor and lender to Mr. Barkany, and I believe, Your
10 Honor, that Mr. Rosenthal actually lost money. So Mr.
11 Rosenthal's still getting together his paperwork. I
12 mentioned to Ms. Stedman (ph) we're going to need another
13 week or so just to -- I'm advised to get all of this
14 paperwork together so that we can file an accurate affidavit
15 of loss. But as I understand it, it -- it's expected that
16 that will be an actual affidavit of loss plus an additional
17 contingent claim because he's being sued by the Canadian
18 Northern Group for large amounts of money.

19 So that, Your Honor, relates to the -- you know,
20 the status of the claims. Ms. Stedman (sic) also pointed
21 out, and she's correct, we owe her paperwork with respect to
22 the backup with respect to Mr. Rosenberg's claim. We have
23 all that. I'm sure we'll be getting that to Ms. Stedman
24 (sic) if not tomorrow, the very beginning part of next week.

25 Just a couple of other points, Your Honor, with

1 respect to the process.

2 Unless I am mistaken, the government has no
3 mechanism or setup to publicize, if you will, anything like,
4 okay, you have six weeks to get in if you believe you're a
5 loser or you believe you have claims against Barkany, you
6 know, get in your claims.

7 So the -- I think the process up to this point
8 has, you know, by virtue of the limitations that we're
9 dealing with as we're, you know, before the Court today
10 really have been limited to the people that have been in
11 court.

12 Now, you know, I know for instance that Mr.
13 Mulholland, as an example, has some -- has -- there are
14 other codefendants in the case where Mr. Mulholland's
15 clients are defendants. And I think Mr. Mulholland may have
16 tried to contact those other people who he does not
17 represent to say, by the way, you know, the government has
18 asked, you know, six weeks and so forth.

19 But, you know, it's kind of very much of an ad hoc
20 certainly less than formal way. And so none of us, as far
21 as I know, have any way of really making it known publicly,
22 you know, that there is this forfeiture and so forth.

23 A couple of other points, Your Honor. I am not an
24 -- I am not an expert in forfeiture law. But as I
25 understand the government's position, the government is not

1 -- has not, at least up until this point in time as far as I
2 know, taken the position that the more than \$20 million on
3 assets that are held by BARM are subject to the forfeiture
4 order. So the government has done nothing as far as I
5 understand to approach BARM and tell BARM, look, you can't
6 do anything with that money because that ultimately may be
7 subject to the forfeiture order and so, therefore, that has
8 to be available for everyone.

9 I do not understand that the government has made
10 any sort of investigation in terms of the assets that BARM
11 is holding, how they got them, what they did with them,
12 monies that may have been used already from those assets. I
13 just don't think it exists.

14 So that is, I think, part of the major problem,
15 you know, to --

16 THE COURT: Well, that -- that goes to the
17 question or the point that I said earlier, and that is no
18 one has explained to the Court the interplay between the
19 forfeiture order that has been entered and the transfer by
20 Mr. Barkany of the assets to BARM.

21 MR. KIRSHENBAUM: Right. I --

22 THE COURT: And how -- and what is the interplay
23 with respect to those and how do the victims of the fraud
24 get compensated.

25 MR. KIRSHENBAUM: Right. And I -- I -- you know,

1 maybe Ms. Stedman (sic) can shed some light on that. Based
2 on -- you know, I don't understand that there's any -- that
3 that has been worked out at all and, frankly, it's been my
4 impression that the government -- the government's view of
5 this is that nothing is final until the final forfeiture
6 order is in place at the time of the sentencing.

7 And by the way, Your Honor, I think perhaps maybe
8 this is something that Mr. Januzzi or Ms. Stedman (sic) can
9 shed a little light on. I believe, Your Honor, there was a
10 hearing in front of Judge Wexler earlier this week. I have
11 heard third-hand, perhaps even fourth-hand that the
12 presentencing process has just begun and -- but I think,
13 Your Honor, that means that it's another six or nine months
14 before sentencing will occur, and perhaps even longer than
15 that.

16 And I think, Your Honor, the government's position
17 is that it's only at the time that there's a final
18 forfeiture order in place that they're going to try to
19 gather assets and see what they can come up with them and
20 distribute what they come up with then.

21 So I just -- it's subject to what Ms. Stedman
22 (sic) may say, I think that if BARM is -- gets away with
23 their intention of distributing assets to their creditor
24 group, it may well be, Your Honor, that those assets will
25 not be brought back by the government. And by the way, Your

1 Honor, I mean, I think that -- I mean, I think we have to be
2 realistic about that as well. Even assuming that it was
3 brought back to the extent that assets are distributed to
4 Ms. Jones and Ms. Jones goes ahead and, you know, passes
5 those assets on or uses them or whatnot and they're gone, so
6 they're gone.

7 So I think, Your Honor, even if it would be the
8 government's intention ultimately the government were to
9 come to the -- to Your Honor today and say, Your Honor,
10 anything that is subject -- that BARM is holding ultimately
11 we're going to grab it as part of the forfeiture order, and
12 if BARM gives it out we're going to go get it back. Well, I
13 mean, if BARM gives it out it may not be in existence. But
14 I think, Your Honor, you're not even going to get to that
15 step because I think the government will tell you they don't
16 know what they're going to do with respect to the BARM
17 assets because they don't know what the BARM assets really
18 are. They haven't really done any work in that regard.
19 That's part of the real problem here.

20 So, Your Honor, I just think that that's a
21 critically important point, and obviously that goes to our
22 motion as well.

23 Thank you.

24 THE COURT: Thank you.

25 I do want to hear from the U.S. Attorney's Office

1 and then, of course, I'll let you speak, Mr. Wasserman.

2 MR. WASSERMAN: Thank you.

3 MS. LEONARDO: Thank you, Your Honor.

4 Your Honor, I think this is why it's important
5 that we have the loss affidavits and any backup paperwork
6 from potential victims with regard to assets that BARM is
7 holding. I'm sure Your Honor knows in forfeiture world
8 there's the Relation Back Doctrine. If there are any assets
9 that were acquired from the beginning of the crime, the
10 government -- it's under the Relation Back Doctrine. The
11 title invests in the government at the time of the crime.
12 And there are just a lot of unknowns that we have at this
13 point.

14 The FBI has been doing a financial analysis of the
15 records that we have to date. I don't know if they're
16 complete records. I'm going to say they're probably not
17 because we are getting additional victims. As counsel just
18 said, there's another affidavit he's gathering also from
19 another potential victim.

20 So that's part of what the issue is, is I -- we
21 don't know what assets here are or if anyone has potential
22 interest in these assets. I think as Your Honor knows it's
23 -- if these are general unsecured creditors, they don't have
24 an interest in any specific asset. So that's another issue
25 we're dealing with.

1 Thank you.

2 THE COURT: Thank you.

3 Mr. Wasserman.

4 MR. WASSERMAN: I had thought all Your Honor was
5 asking for was a status report. Instead you heard arguments
6 on the merits. I'll refrain from responding with argument
7 on the merits and trust that I'll have the opportunity to do
8 that when you actually ask us for that.

9 THE COURT: Yes, you will.

10 MR. WASSERMAN: The one point I did want to make
11 is that in addition to the loss affidavits and the
12 supporting documentation which we provided, and the loss
13 affidavits do say that you are required to attach supporting
14 documentation to them. They were sent to us. We complied
15 with the instructions. I'm not sure why other parties
16 didn't. The government also asked us for a list of Mr.
17 Barkany's investors and other potential victims. We
18 provided them with an extensive schedule of that to enable
19 the government to reach out to those people, if they were
20 inclined to do so, to identify any additional victims.

21 That's all I wanted to add, Judge.

22 THE COURT: Thank you.

23 MR. JANUZZI: Judge, may I just say one thing --

24 THE COURT: Yes.

25 MR. JANUZZI: -- very quickly?

1 As I indicated the first day, one of the reasons
2 the sentence has been put off is to allow my client the
3 opportunity to make restitution prior to sentencing.

4 Since the last time we've met, both his criminal
5 counsel and I have verified these investments and these
6 business opportunities that he's had and reported them back
7 to Mr. Caffaroni (ph), including going down to Abilene,
8 Texas and viewing some of the sites that are under
9 development there.

10 Pursuant to those efforts on the last court date
11 Mr. Barkany tendered \$194,000 in additional funds towards
12 restitution which is being held in the escrow account of
13 Bruce Barkette (ph), his criminal attorney.

14 Also since the last time we've met here, myself
15 and the attorneys from Locke Lord have met on two occasions.
16 As I had indicated on the prior conference date, that since
17 our dispute that we had in June we have set aside those
18 differences and been working out. To date, we have
19 identified and assigned values to the assets that have been
20 turned over to BARM. We are not completely there yet,
21 Judge, and there is more that goes into this accounting.

22 But I'm comfortable in saying that setting aside
23 that \$194,000, we're fairly into agreement on \$19,886,000 of
24 value plus there's real estate that we're still looking at
25 which will add somewhere between, I'm going to say -- and

1 I'm not holding anybody to this -- somewhere between four
2 and \$6 million into that pot.

3 In addition, there is \$4 million worth of assets
4 in unrealized stock. These were like new ventures and they
5 haven't been proven yet, and they may end up being valueless
6 or they may end up being worth \$4 million.

7 So those things are still being looked at and
8 worked out. But it's not as if there's no progress being
9 made on that. Again, I think twice since we've met last
10 time I've sat down with these attorneys and gone through
11 this -- you know, these numbers and working out these
12 figures.

13 Okay. Thank you.

14 THE COURT: Thank you.

15 It seems to me that some additional work does
16 indeed have to be done to the extent that documents are
17 still needed by the Office of the United States Attorney
18 with respect to the affidavits of loss. I would certainly
19 urge those on my right-side of the table here. To the
20 extent that either any of the petitioning creditors or any
21 of these contingent creditors have yet to provide the
22 information that has been requested or that is needed by the
23 Office of the United States Attorney, then I would certainly
24 urge you to do so as promptly as possible.

25 It seems that counsel for Mr. Kessler would like

1 to be heard.

2 MS. LEVINE-SHAPIRO: Yeah. Just -- I just wanted
3 to let the Court and all other counsel know that Mr. Kessler
4 has filed an affidavit of loss with the U.S. Attorney the
5 first week of November. And he is prepared to also file a
6 proof of claim in Bankruptcy Court.

7 And just in terms of figures, he's being sued by
8 BARM for over 3 million -- about \$3,300,000, plus interest,
9 legal fees and costs. But if you look at just his
10 transactions with Barkany on an individual basis, he
11 advanced funds to or on behalf of him. He has a total loss
12 of \$269,133.13. And if you then figure in the business
13 transactions that he had with the Barkany various corporate
14 entities, he ends up with a -- still with a net loss of --
15 one second. Sorry. Oh, it's not specified there. It's a
16 net loss of \$68,924.53. That's including the personal and
17 the business transactions combined.

18 THE COURT: Thank you.

19 Again, I just urge everyone to cooperate with the
20 U.S. Attorney's Office and provide the requested information
21 as promptly as possible. And we'll also at some point have
22 to deal with the concept of the forfeiture and the relation
23 back issue. That goes towards the assets, whether it's
24 tangible or intangible assets that are being held by BARM
25 and how that's going to interplay with respect to the U.S.

1 Attorney's Office. And as counsel correctly pointed out,
2 we've got issues with the Relation Back Doctrine.

3 So with that said, let me move to the second issue
4 that I wanted to address and that had to do with the filing
5 on November 11th of the supplemental affirmation by Borgata
6 in further opposition to the debtor's motion to dismiss.
7 That supplemental affirmation didn't assert that the Borgata
8 claim is fixed both as to liability and to amount.

9 And my question is, is that, I guess it's for Mr.
10 Januzzi in the first instance, what is the debtor's position
11 with respect to this? Is the debtor now in essence saying
12 that based upon a review of the documentation the debtor
13 believes that he will withdraw its challenge to the Borgata
14 claim and that there is no longer a bona fide dispute as to
15 liability or amount, or is the debtor wishing to proceed on
16 the challenge of the Borgata claim?

17 MR. JANUZZI: No. That issue has not been
18 resolved, Judge. From my understanding -- again, and this
19 was consistent with all that was going on at the last
20 conference -- the discovery that's being produced is being
21 turned over to BARM and to David Belski (ph) for their
22 review. And Your Honor may recall that my client's
23 position, his opposition was that based on what we were told
24 by a forensic accountant there's an issue with respect to
25 liability and amount. That still exists and has not been,

1 to my knowledge, resolved.

2 There are emails that are attached to that that
3 predate my client being informed of the fact that there was
4 this discrepancy in the accounting, and those emails, while
5 they reference that my client was acknowledging some form of
6 a debt, do not mention any specific amount and would predate
7 his knowledge of the fact that a forensic accountant, after
8 getting authorization from my client to review all records
9 was not given the records in total. And the records that he
10 was given indicated to this forensic accountant that there
11 was a discrepancy of not only did my client not owe them
12 \$240,000, but in fact they owed my client money. That is
13 still our position today.

14 My understanding with respect to the discovery
15 that's been turned over, while somewhat lengthy, it has all
16 been summaries of materials that they have as opposed to the
17 actual materials themselves. So that's like saying, I'm not
18 going to show you what I have. I'm going to tell you what I
19 have and take my word for it, and that's not acceptable in
20 any court. I'll let Mr. Wasserman address it specifically
21 because I believe he's been on the back and forth of this.

22 But that's my understanding of looking at the
23 emails and the exchanges that's gone on between counsel so
24 far.

25 THE COURT: All right. I just wanted to make sure

1 that we're still in a dispute here and we really need to
2 resolve this threshold issue.

3 MR. JANUZZI: We are still in a dispute.

4 THE COURT: And, you know, the threshold issue has
5 been hanging over us for quite some time. So the Court is
6 inclined to set this down for an evidentiary hearing with
7 respect to the involuntary petition and the claim that's
8 being asserted by the Borgata and the opposition that's
9 asserted by the debtor that there is a bona fide dispute as
10 to liability or amount.

11 And looking at our calendar, we are --

12 MR. JANUZZI: Judge, if I may for one second.

13 THE COURT: Yes.

14 MR. JANUZZI: Do you feel at this point you have
15 all the documents that are required for you to go forward
16 with an evidentiary -- well, for me to go forward with the
17 evidentiary hearing with Mr. Belski?

18 THE COURT: Well --

19 MR. JANUZZI: Because I think that's the problem
20 that we are faced with, Judge. Mr. Wasserman is going to
21 say we haven't gotten the discovery to go forward with the
22 evidentiary hearing. Am I wrong, sir?

23 MR. WASSERMAN: May I be heard?

24 THE COURT: And -- and I'm sure that counsel for
25 the Borgata is going to say, I gave you what you need and

1 I'm prepared to substantiate our claim both as to liability
2 and as to amount. And so, to me, the issue has been joined
3 and we really need to get to this hearing. We've sort of
4 been in limbo during this gap period, so we need to get to
5 the hearing.

6 MR. WASSERMAN: I just have one question related
7 to that. We agree with Your Honor. I was prepared to
8 demonstrate that we don't have sufficient documentation and
9 I -- I also agree with Mr. Klausner that we could go on
10 forever this way and, ultimately, we do need to have an
11 evidentiary hearing.

12 What I think my client would like me to do is to
13 clarify what our role is, if any, in that proceeding. If
14 you go back to the papers which we've submitted in
15 connection with our objection, one of the arguments we made
16 -- and I'm not going to reargue our position -- is that once
17 Mr. Barkany filed his objection to the Borgata claim, that
18 the issue of standing became moot and, therefore, we had a
19 right to participate in those proceedings and support the
20 objection.

21 There are other arguments in our papers as well.

22 It's unclear from, I think it was your amended
23 order, to me whether you anticipate Mr. Januzzi using Mr.
24 Belski as his witness, which is what Mr. Januzzi said he
25 would do and whether we would be allowed to participate in

1 that process.

2 So I thought clarification on that might be
3 helpful.

4 THE COURT: With respect to the issue in the
5 challenge of the claim asserted by Borgata, it was Mr.
6 Barkany that challenged that out of the box on the first
7 instance. And so it's going to be the burden on Mr. Barkany
8 and, of course, the Borgata with respect to that evidentiary
9 hearing as to whether or not the Borgata has a qualified
10 claim, whether or not there's no bona fide dispute as to
11 liability or amount.

12 And so with respect to that hearing, while Mr.
13 Belski is going to have to, I'm assuming, be the witness
14 because I can also assume that Mr. Barkany is not going to
15 be here to testify in any shape or form. And so to the
16 extent that Mr. Barkany is now going to look to challenge
17 the claim filed by the Borgata, he is going to be looking
18 for documentary evidence and testimonial evidence and the
19 likely source of that is going to be Mr. Belski.

20 Now I'm not saying that no one can object on any
21 grounds with respect to the documents or with respect to the
22 oral testimony, but that's the role that I'm assuming being
23 played.

24 With respect to Mr. Rosenberg's claim and Mr.
25 Kessler's claim, we still have the issue as to whether or

1 not the Court is revisiting the standing issue. But let's
2 also not forget that you also have a motion to dismiss this
3 case in the event it is determined that the petitioning
4 creditors have qualified claims and an order for relief is
5 entered we would then immediately have to tee up a hearing
6 with respect to your motion to dismiss.

7 MR. WASSERMAN: Well, I would suggest -- I'm still
8 not sure, Judge, have you ruled on our motion? We argue
9 that we have standing to assert the objection on the same
10 grounds that Mr. Barkany did. The authorities which were
11 cited contrary to that is that only the debtor has standing.
12 We cited to authority for the proposition that once the
13 debtor asserts an objection, then that opens the door to the
14 other parties to participate with respect to the grounds of
15 that objection.

16 Now I understand you're holding Mr. Rosenberg and
17 the other petitioners in abeyance to deal with this
18 threshold issue first. I guess what I would ask, Judge, is
19 if we could get a ruling. We believe we should be able to
20 participate to the same extent as Mr. Barkany. It's
21 something we feel strongly about and we would like a ruling
22 or a decision so if we decided we wanted to appeal that, we
23 could.

24 But from a practical standpoint, I'm not concerned
25 about whether or not Mr. Barkany's counsel is the lead

1 counsel on it if we're able to participate fully and cross-
2 examine witnesses and make objections to documents. We're
3 perfectly comfortable with that. I'm not sure if that's
4 what you had in mind, though.

5 THE COURT: Thank you. I -- I don't know if Mr.
6 Kirshenbaum wishes to be heard. This really wasn't on
7 today, so I'm not going to hold it against the parties for
8 maybe not being prepared to address the standing issue. But
9 I'm happy -- well, I guess in the first instance I should
10 hear from counsel for the Borgata with respect to let's get
11 to this threshold issue.

12 You know, one of the reasons why I wanted to
13 address the threshold issue is so that we didn't get
14 embroiled in the standing concept here because there are a
15 legion of cases that say only the debtor can contest the
16 involuntary petition. And I know, Mr. Wasserman -- I'm not
17 making any ruling and I know that you have raised certain
18 issues with respect to standing, you know, the paralysis
19 issue, you know, that Mr. Barkany wasn't able to, because of
20 familiar relationships, object to the claim that was
21 asserted or that the fact that the involuntary petition
22 included his father-in-law. And I'm not unmindful of that
23 and I didn't forget that.

24 But you do, as I said, have a legion of cases that
25 talk about the debtor having standing and -- to object to

1 the petition and usually creditors do not. And there are
2 issues, there are reasons for that.

3 If creditors were the recipient, for example, as I
4 think we may have mentioned once before, if a creditor is a
5 recipient of a preferential payment, you certainly wouldn't
6 want that creditor coming in to oppose the filing of an
7 involuntary petition because it's really in their own self-
8 economic interest that the bankruptcy goes forward. Then
9 they have to disgorge funds to the extent that that
10 preference is then avoided during the course of the case.

11 So the concept is, with respect to the majority of
12 cases, is that the debtor would have standing to contest the
13 involuntary and creditors that were concerned about the
14 involuntary petition are not without a remedy. They have a
15 remedy. They can move to dismiss the case as BARM has done
16 under 305.

17 So I will hear from counsel for the Borgata, but I
18 -- I'm not going to hold the parties to addressing the
19 standing issue because I did not schedule any type of
20 hearing today and I don't want the parties to feel that any
21 of their rights were abridged to the extent that they wanted
22 to add any oral argument to the written submissions that
23 have already been placed with the Court.

24 But let me hear from counsel for the Borgata with
25 respect to the issue of the claim and the fact that there

1 may be additional documentation that's been requested on
2 behalf of BARM by -- you know, by Mr. Wasserman.

3 MR. KLAUSNER: Judge, everything that has
4 transpired --

5 THE CLERK: Sir, please state your name for the
6 record.

7 MR. KLAUSNER: Oh, I'm sorry. Jeremy Klausner,
8 Agostino & Associates for Borgata.

9 As Your Honor knows from my supplemental
10 submission the other day, the Borgata has supplied
11 voluntarily to BARM and to its forensic accountant the
12 entire account history for Mr. Barkany along with other
13 information, including wire transfers, cash transactions,
14 check transactions, chip transactions. The only actual
15 physical information they need is the account history.

16 What they're asking for now is for us to go into
17 our storage facility and retrieve 60 boxes of documents, 6-0
18 and have several of our employees spend a couple of weeks,
19 two to three weeks sifting through so that they can get the
20 underlying document. The information is all the same.
21 Every transaction that Mr. Barkany engaged in with Borgata
22 is in the information that was provided.

23 And now tellingly if you look at the letter that
24 BARM sent on November 5th, they say they need the additional
25 documentation not evaluate whether -- not to evaluate

1 whether there's a debt, but they're now -- they want to
2 evaluate the enforceability of the various markers which Mr.
3 Barkany apparently executed and the Borgata casino deposit.

4 The markers that are at issue have been provided.
5 Those have been provided, the ones that bounced. Okay.
6 Those are the ones that are at issue. Every other
7 transaction has been provided to them. And at this point,
8 it is onerous because, as Your Honor said in the first day,
9 it's Mr. Barkany's objection. And based on the evidentiary
10 standard that he has to meet, he can't meet it. He has no
11 evidence. He has the hearsay statement of someone who is
12 not an expert, has not been qualified as an expert and, by
13 the way, don't think could be qualified as an expert in this
14 case.

15 So even if Mr. Belski were to testify, the only
16 thing that I believe he could testify to is -- are facts,
17 and the facts are what's in the documents that Borgata
18 provided. Those are the facts. And the fact is that those
19 documents, the accountant (indiscernible) says, oh, I'm
20 sorry. Mr. Barkany owes us \$340,000. Every transaction is
21 (indiscernible). That's our position. Mr. Barkany has not
22 asked for any documents, has not subpoenaed. He has not
23 sent any document requests.

24 We have cooperated with BARM, and up until
25 November 5th when they asked for -- and I won't even go into

1 the additional information that they asked for that has
2 absolutely nothing to do with this case. But we gave them
3 everything that they wanted and we answered all their
4 questions, and then this letter came on November 5th.

5 So that's -- that's where Borgata is at. We are
6 more than happy to proceed to a hearing. However, I submit
7 that given the evidence in this case, there's -- (a) there's
8 no need for a hearing, and for Mr. Barkany to maintain his
9 position based on this hearsay in the light of what has been
10 provided borders on frivolous.

11 I -- we're really getting to the point where we're
12 wasting time. And if Mr. Barkany's not going to testify
13 himself that he doesn't owe Borgata money, how can he
14 maintain that claim. I just don't understand that from an
15 evidentiary standpoint.

16 THE COURT: Thank you.

17 MR. JANUZZI: Clearly, he can have an accountant
18 who has been given the records and who has reviewed them
19 testify that there's a discrepancy as to the amount of money
20 that's being claimed owed if any at all. And he is an
21 expert. He's a forensic accountant who has testified in
22 dozens of cases.

23 So it's our position that there is a qualified
24 expert. He will be testifying. He'll be going through
25 those records and they have a burden to meet, and from the

1 records that I have seen I don't know that they're going to
2 be able to meet those -- meet those burdens because I don't
3 think their evidence is going to be sufficient.

4 So I'll -- I'm happy to go forward with the
5 hearing.

6 THE COURT: Well, we need to select a date. And
7 the Court was thinking of Monday, December 15th.

8 MR. JANUZZI: That sounds fine to me, Judge.
9 Eleven o'clock?

10 UNIDENTIFIED SPEAKER: (Indiscernible).

11 MR. JANUZZI: Oh, I know. I know. I'm saying it's
12 fine for me.

13 THE COURT: I know that we have parties coming
14 from Jersey. So I guess it's -- how about 10:30? Would
15 10:30 work, or is that a much more difficult for you and you
16 would rather have the 11:00?

17 MR. KLAUSNER: Well, it's not as difficult for me
18 as it is for the person who is coming from Atlantic City.

19 THE COURT: So 11:00 would work better?

20 MR. JANUZZI: Judge, is it possible to have it at
21 2:00?

22 THE COURT: I think maybe we ought to start at 11
23 just in the event that this runs kind of late. So that
24 would be December the 15th at 11, and it's --

25 MR. JANUZZI: Judge, could we just have one minute

1 to call our witness?

2 THE COURT: Yes, of course. We'll take a short
3 recess. Absolutely you can have time to --

4 MR. JANUZZI: Thank you.

5 (Recess taken at 12:01 p.m.; resumed at 12:10 p.m.)

6 THE COURT: Thank you. Please be seated.

7 MR. JANUZZI: Again, sir, thank you for that
8 opportunity.

9 THE COURT: It's fine.

10 MR. JANUZZI: Mr. Belski will be available on that
11 date.

12 THE COURT: Okay. Thank you.

13 MR. KLAUSNER: Judge, if I may, perhaps the Court
14 can assist me in facilitating this. I am going to subpoena
15 Mr. Barkany, and instead of subpoenaing him maybe Mr.
16 Januzzi can agree to bring Mr. Barkany.

17 MR. JANUZZI: Well, unfortunately, no. I'll be
18 making a motion to quash that subpoena.

19 MR. KLAUSNER: All right. Well, I'm going to
20 subpoena Mr. Barkany.

21 THE COURT: And --

22 MR. JANUZZI: So we'll have a motion to adjourn
23 till that date, too, then, Judge?

24 THE COURT: I would suspect so. And, you know,
25 we're now on for December 15th at 11, but I am going to ask

1 for supplemental papers to be filed based upon an
2 interesting concept that Mr. Wasserman raised and that is
3 sort of a different standing issue than the one that we were
4 talking about with respect to Mr. Rosenberg and Mr. Kessler,
5 and that is that once a debtor has opposed to file even an
6 involuntary, does that open up the flood gates and permit
7 creditors to join in and oppose and participate in that
8 hearing.

9 And so that, to me, is a little bit of a different
10 issue and I don't expect the parties to address it today
11 because it wasn't on for today's calendar, but it's an
12 interesting issue that's been raised by Mr. Wasserman. And
13 so I would give the parties one week to submit a
14 supplemental pleading, both simultaneously.

15 In other words at the same time you submit a
16 supplemental pleading. Mr. Wasserman, obviously, arguing
17 that indeed, you know, BARM will -- as a creditor is given
18 standing because the debtor has filed the opposition, and
19 the petitioning creditors certainly would be able to file
20 any pleadings that they wish to file saying that that
21 certainly isn't the case; that only the debtor has standing
22 to oppose the involuntary petition.

23 So that would be one week from today which is
24 November 20th. And then we'll hold December the 15th at 11,
25 but that date may change depending on the supplemental

1 pleadings. But the Court certainly would advise the parties
2 as promptly as possible. The difficulty with not holding to
3 December 15th would mean, based upon scheduling, that we may
4 end up in January.

5 MR. KIRSHENBAUM: Your Honor, anytime there is a
6 court hearing in this case, you know, I certainly intend to
7 be here. So I am not pushing anything on all of my
8 wonderful colleagues that I wouldn't be at least, you know,
9 sharing the burden myself in terms of appearing in court.
10 Of course, I know we all feel it's a pleasure to be in front
11 of Your Honor anyhow.

12 THE COURT: Well, thank you.

13 MR. KIRSHENBAUM: But I think, Your Honor, if
14 there's going to be an issue with respect to Mr. Barkany's
15 appearance, so I think that, number one, it would be a shame
16 and I think it would be a travesty if Mr. -- we have to
17 waste time now, but Mr. Klausner arranging to subpoena Mr.
18 Barkany and then once that subpoena comes through, then Mr.
19 Januzzi files a motion to quash. And that's presumably a
20 pretty critical part of any creditors' case in the debtor's
21 view.

22 And so I would respectfully ask Your Honor that
23 since we know that you certainly can direct Mr. Januzzi to
24 have Mr. Barkany appear at the hearing. Mr. Klausner is --
25 has informed the Court that he would like to examine Mr.

1 Barkany at the hearing. And you've heard Mr. Januzzi say
2 that they oppose. I would respectfully request, Your Honor,
3 that Mr. Januzzi be directed also to file a motion to quash
4 that subpoena within the same time frame, within a week.

5 And I would also suggest Your Honor that it would
6 be very important to have whatever hearing, you know, would
7 be appropriate with respect to that motion to quash in
8 advance of the 15th because, to me, number one, you know, we
9 could end up on the 15th, you know, dealing with everything
10 other than evidentiary matters in an actual hearing and
11 then, as Your Honor indicated, we're into January, for all
12 intents and purposes. And so that's -- that's one factor.

13 And then the second factor is, I mean, I think
14 it's critically important for Mr. Klausner to know whether
15 Mr. Barkany will be here or whether he won't. And if -- and
16 by the way, Your Honor, we -- the truth is we could short
17 circuit this whole thing because if Mr. Januzzi is going to
18 -- if Mr. Januzzi can state on the record that Mr. Barkany
19 will take the fifth with respect to all of the questions
20 that Mr. Klausner is going to ask him, then he can do that
21 in his papers and then Mr. Klausner has the opportunity,
22 which I would -- if I was in Mr. Klausner's shoes I know I
23 would take -- certainly take full advantage of to basically
24 take the position before Your Honor that if Mr. Barkany's
25 taking the fifth with respect to all the questions relating

1 to whether he owes money to the casino, that's the end of
2 the case.

3 And I think, Your Honor, some of the case law that
4 we've already put in front of Your Honor in connection with
5 our opposition papers to the motion to dismiss that pointed
6 out that Mr. Barkany took the fifth throughout his
7 deposition goes to that issue. So it's already been teed
8 up. It can be teed up again and that can be dealt with in
9 advance of the 5th (sic).

10 I think, Your Honor, the case law is pretty clear
11 -- and it's not for today -- but I think that -- that's a
12 real issue that Your Honor will have to face. That may make
13 the entire evidentiary hearing go away. We may be moving on
14 to the next issue if that's going to be Mr. Barkany's
15 position that he can't testify with respect to his claim to
16 -- the Borgata's claim.

17 THE COURT: Well, I'll certainly hear from Mr.
18 Januzzi, but I would suspect that Mr. Januzzi is going to
19 have to have a conversation with Mr. Barkany's criminal
20 defense counsel with respect to this issue. But I'm happy
21 to hear from Mr. Januzzi.

22 MR. JANUZZI: I would say that if my client
23 submitted an affidavit saying that based on his own
24 knowledge and from his own review he disputes something,
25 then clearly he would be opening himself up to an

1 examination. That's not what he said, though, Judge. So I
2 don't know what possible impact my client's testimony would
3 even have that they need to take it.

4 But that being said, I've had these conversations
5 already. If they're going to serve a subpoena, I'm going to
6 be making a motion to quash and I -- when it's returnable,
7 if you want to make it on the 20th, that's fine with me,
8 too. I mean, it's not like I don't know what the cases are
9 going to say. So I'm prepared to go forward with that
10 motion.

11 I'm going to talk to Mr. Klausner because I don't
12 really understand why he's doing it. It seems almost like
13 just a harassment. But considering the limited issue we've
14 put before the Court in our motion papers, it seems like a
15 harassment. But I'll speak to him before. But if he's
16 serving that subpoena, I'm serving the motion.

17 THE COURT: Thank you.

18 MR. JANUZZI: Do you want it on --

19 THE COURT: I --

20 MR. JANUZZI: -- the 20th, Judge?

21 THE COURT: Well, I appreciate your offering to
22 put it on for the 20th. The difficulty is is that I'm in a
23 conference in Washington, D.C. all of next week. So,
24 unfortunately, you know, I am not available next week. We
25 have to start figuring out the dates as to when we would

1 hear the motion to quash because Mr. Kirshenbaum, you know,
2 does raise a point that let's not waste time on the 15th.
3 That that motion to quash would have to be determined, you
4 know, in advance of having a hearing on our threshold issue
5 of the Borgata claim. So we'll have to revisit our calendar
6 and let the parties know a date because if we're going to --
7 if we're going to hear the motion to quash, it would have to
8 be well in advance of the 15th and --

9 (Pause)

10 THE COURT: All right. The Court will, after we
11 break here at some point, after we hear the 2004 issue, will
12 revisit the calendar and figure out the best dates to handle
13 all of this. I'm assuming there's going to be a subpoena
14 issued. There's going to be a motion to quash. The issue
15 is what would be the return date of that motion to quash.

16 MR. JANUZZI: Okay.

17 MR. KLAUSNER: Judge, from an evidentiary
18 standpoint, I've got to be honest with you. I don't
19 understand how they can proceed based on this -- the posture
20 of this case as it is. The position that -- I don't owe --
21 I don't owe Borgata money because somebody told me I don't.
22 That's what -- that's hearsay, I mean, just from an
23 evidentiary standpoint, and we're going to proceed with a
24 full blown hearing based on that and they're going to move
25 to quash because that's okay because the debtor doesn't have

1 to say, I don't -- I don't owe Borgata any money. Somebody
2 told me I did. He's not even going to come in and say that
3 if he doesn't testify.

4 MR. JANUZZI: Judge, if I may, if my client --

5 MR. KLAUSNER: That makes no sense.

6 MR. JANUZZI: -- was coming in to testify that
7 someone told him, that would be hearsay. That's not what's
8 happening. The declarant who is a forensic accountant is
9 coming in to testify. That's a whole different scenario and
10 that is not hearsay, Judge.

11 MR. KLAUSNER: Judge, he's --

12 THE COURT: That would be the evidentiary issue,
13 one of the evidentiary issues. I'm assuming --

14 MR. KLAUSNER: Judge, we're -- but -- but he's --

15 THE COURT: -- there's going to be more, but that
16 will be one of the evidentiary issues --

17 MR. KLAUSNER: -- he's already --

18 THE COURT: -- at the hearing.

19 MR. KLAUSNER: Judge, he's already said it. It's
20 hearsay. He's already said it. He put it in an affidavit,
21 somebody told me that I don't owe the Borgata money. That's
22 hearsay. Whether Mr. Belski comes in at the hearing or not
23 doesn't change that fact. They can't meet the initial
24 burden to move forward. I mean, I -- that's what the case
25 law says. I don't -- so I don't understand how it's

1 possible for them to even call Mr. Belski without first
2 having Mr. Barkany testify. I just don't understand it.

3 THE COURT: You -- you were up. You came down.

4 MR. WASSERMAN: What I was going -- what I was
5 going to suggest, Your Honor, is this is probably Exhibit A
6 to the reason that BARM should be given standing with
7 respect to this hearing because they're arguing on the one
8 hand that Mr. Barkany owes us money, but Mr. Barkany can't
9 testify in connection with that and Mr. Belski can't testify
10 because of hearsay.

11 Mr. Barkany, because of the posture of his
12 criminal case, is impaired. And we'll argue that in our
13 supplemental submission.

14 THE COURT: All right. That's fine. So the
15 supplemental submission will be filed by both parties on the
16 20th of November, and the Court will look at its calendar
17 and make a determination with respect to the motion to quash
18 and when we would have the hearing with respect to the
19 Borgata claim and the involuntary petition.

20 MR. WASSERMAN: I agree.

21 MR. JANUZZI: To make it somewhat easier for
22 counsel, I would (indiscernible) statements on this.

23 THE COURT: Counsel, you --

24 MR. JANUZZI: So you don't have to serve that --

25 THE COURT: -- heard that?

1 MR. JANUZZI: -- on my client? You can serve the
2 subpoena.

3 MR. KLAUSNER: Thank you.

4 THE COURT: Thank you, Mr. Januzzi.

5 MR. JANUZZI: Certainly, sir.

6 THE COURT: All right. Why don't we move to the
7 -- let's move to the next item on the calendar, which is the
8 request by the petitioning creditors and contingent
9 creditors for a Bankruptcy Rule 2004 examination of BARM.

10 MR. KIRSHENBAUM: Your Honor, you've, as always,
11 been very generous with your time. And I don't believe,
12 Your Honor, that this is something that requires too much
13 more of your time. I think that our case has been laid out
14 very, very well in the papers. I think that actually what
15 you've heard this morning highlights some of the reasons
16 that we are, I think, absolutely abundantly entitled to the
17 discovery that we have requested.

18 The law is clear that 2004 applies to the gap
19 period. We cited to you the only case that we found on the
20 subject. Collier cites to Judge Garratty's (ph) opinion
21 going back approximately a dozen years where he criticized
22 one of the petitioning creditors who was concerned about
23 asset transfers for not utilizing the 2004 process in order
24 to take discovery before coming to court with an attempt to
25 deal with the problem that the creditor was concerned about

1 because without having taken the discovery, there could be
2 no record created upon which the court could proceed.

3 There is nothing to support the premise that the
4 2004 discovery that we're requesting is something that is --
5 that it does -- that is not appropriately looked into during
6 the gap period when Your Honor has been told by BARM that
7 they intend during the gap period to move assets and to take
8 proceeds of assets from Barkany that they've liquidated and
9 distributed among their members. Up to this point in time,
10 Your Honor, the government has made no investigation of
11 those assets.

12 This morning Ms. Stedman (sic) and Your Honor and
13 others made the point that a forfeiture order can, it
14 doesn't have, to but depending on whatever the District
15 Court decides to do it can ultimately relate back.

16 However, Your Honor, it's clear that a forfeiture
17 order only covers property that represent proceeds of the
18 fraud or property that constitutes instruments used in
19 connection with perpetrating the fraud. It does not include
20 property that would fall outside either of those two
21 categories.

22 Your Honor has heard much -- there has not been,
23 of course, much in the way of evidence. It just hasn't --
24 we haven't been at that stage yet. But Your Honor has heard
25 much of the fact that the -- it appears that Barkany, while

1 engaging in many fraudulent transactions, also engaged in
2 real transactions. And we have no idea -- Your Honor heard
3 this morning that there are real -- that there are real
4 actual parcels of property that were transferred to BARM,
5 presumably parcels of property that were transferred to BARM
6 may have been the products of real transactions.

7 Your Honor has heard about security accounts that
8 have been transferred to BARM. Those may have been the
9 products of real transactions. They may not constitute
10 fruits of particular fraudulent transactions, and it may
11 very well be that they don't constitute instruments of the
12 fraud.

13 Moreover, Your Honor, there is nothing in the
14 record that Your Honor has which at all ties anything that
15 BARM is holding to any of the losses that BARM suffered. In
16 fact, Your Honor, as we pointed out, not evidence because
17 there is no evidence so far, but, again, many of the BARM
18 creditors made substantial monies on all of the transactions
19 with Barkany until mid-2010. And that's when apparently
20 Barkany, in his last little transactions with those people,
21 for lack of a better term did not repay what he took from
22 them in the last transactions.

23 But there's testimony in some of the depositions
24 taken by Mr. Warren on behalf of Zoock and Costell (ph) in
25 that State Court litigation where three different BARM

1 members, including -- I mean, apparently three of the --
2 certainly Mr. Groman (ph) is one of them. Mr. Groman claims
3 he is owed \$46 million. Mr. Groman testified when he lost
4 his money. Mr. Groman lost his money in that last six-month
5 period in the form of monies that he transferred that never
6 went further.

7 So there is real value that they are holding, and
8 you -- there is nothing upon which anyone could conclude
9 based on the record that they are proceeds of the fraud,
10 instruments of the fraud, or that the properties that they
11 were given all tie into their losses, the BARM category of
12 losses.

13 The government is not doing anything at this point
14 in time to prevent BARM from taking any actions that BARM
15 chooses to take. So BARM has told the Court that it intends
16 to distribute assets. It is the position of the petitioning
17 creditors and the other moving parties that that's -- it may
18 very well be a very unfair thing to do. That is not
19 something, Your Honor, that tends to result in any equality
20 of distribution.

21 So if BARM intends to go forward, we certainly
22 want to be in a position to be able to deal with that if we
23 think that it should be dealt with, and we should be given
24 the opportunity, we should be given the information that we
25 need to try to prevent that from happening in the event that

1 BARM goes forward with its stated intentions.

2 And we can't do anything, Your Honor, without any
3 information. We know nothing. We know nothing. We only
4 know -- until today we knew that Mr. Januzzi's co-counsel,
5 Mr. Barkette, had sent a piece of paper to the Court where
6 he claimed that the value of what was given to BARM may have
7 been up to \$30 million. BARM six months ago filed an
8 affidavit of partial payment in State Court where they
9 admitted that they had received \$10 million of value. In the
10 more recent letters that BARM filed they admitted that it
11 was \$20 million of value.

12 You heard Mr. Januzzi say this morning that he's
13 been dealing with BARM and they've now agreed that there's
14 \$19.6 million in undisputed value. I assume that means
15 maybe cash. I assume, but I don't know. And that there's
16 about \$4 million in real estate, at least, maybe of a higher
17 value, and \$5 million in -- perhaps \$5 million in stock.

18 So that to me, Your Honor, doing quick math gets
19 up to \$28.629 million. He's talking to BARM. BARM's
20 providing him with information. I'm talking about Mr.
21 Januzzi. Mr. Januzzi's client, Mr. Barkany, is not getting
22 any of that back, presumably. But the other creditors in
23 the case may very well be entitled to that.

24 So, Your Honor, I think that it is abundantly
25 clear -- it's abundantly clear that we are entitled to take

1 2004 discovery, get the documents and start becoming
2 educated into what occurred four years ago when as Mr.
3 Januzzi very succinctly and appropriately in his letter to
4 Judge Wexler said, when Mr. Barkany, without being
5 represented by counsel, went into BARM, went into -- met
6 with BARM's lawyers and BARM's accountants and signed
7 agreements that we've never seen, and signed title documents
8 that we've never seen, and transferred properties that we've
9 never seen and no nothing about.

10 It's not fair, Your Honor, that BARM should be
11 entitled to go forward with its stated intention without
12 giving us the right under 2004 to take discovery. What
13 could be more connected to part of the debtor's stated of
14 affairs, the debtor's assets and affairs, 2004. Any party
15 in interest is entitled to take discovery of anything
16 relating to the debtor's affairs. What could be more basic?

17 And, Your Honor, there is no trustee now. The
18 suggestion that, well, only a trustee is -- as in their last
19 footnote -- only a trustee could bring an avoidance action
20 and, therefore, only a trustee would have a standing to 2004
21 discovery. It doesn't work that way, Your Honor. Any party
22 in interest in entitled to take discovery. That's true even
23 if there is a trustee. If there's a trustee in place, a
24 creditor is entitled to take discovery.

25 Now if there's a trustee in place, the trustee

1 could say, Your Honor, I don't think that this creditor, you
2 know, should be entitled to take discovery or, you know, the
3 creditors should be taking discovery together with me
4 because, you know, you can't double hit or triple hit. But
5 the fact, even when there's a trustee in place, that doesn't
6 preclude creditors from taking their own 2004 discovery.

7 So if a trustee being present does not preclude
8 parties in interest from taking discovery that's germane to
9 them or germane to the estate, (indiscernible) we can't be
10 prevented from taking discovery when there is no trustee,
11 and the suggestion that only a trustee could bring the case,
12 an avoidance action and, therefore, since a trustee would be
13 the only one that would have standing to bring the avoidance
14 action, therefore, we can't take discovery. I mean, that's
15 -- that's an outrageous statement. It's an outrageous
16 statement.

17 I don't agree with it. I don't agree with the
18 premise or the suggestion that this Court would be without
19 remedy to deal with that if that, in fact, became the case.
20 I mean, the code is very clear. Even while a gap period is
21 pending, while the involuntary is pending before a decision
22 has been made, the Court could appoint a trustee to take
23 possession of the debtor's profit -- assets and properties
24 in order to preserve them.

25 So, again, right now there is no record upon which

1 we could do anything. We -- if BARM gave notice in two
2 weeks, Judge, we're distributing. Good luck to everyone.
3 He'll come into court. What are we going to do? We could
4 come into court and say, Judge, you've got to stop him, but
5 presumably Your Honor would say, well, what's your proof?
6 You have to make an evidentiary record. You have to give me
7 some basis upon which to rule. Right now I have no basis.
8 I have -- I know nothing.

9 So I think, Your Honor, it would be an absolute
10 travesty of justice to permit BARM, particularly with what
11 you do know, which as I said you do know that -- and BARM
12 does not dispute that Mr. Barkany turned over properties,
13 cash, real estate, stock in companies and we don't know the
14 particulars, but he turned this all over without
15 representation by counsel four years ago. It's worth more
16 than \$20 million and BARM wants to distribute it among its
17 clients. It doesn't -- it can't -- it can't be right,
18 Judge. You can't leave the creditors without remedy to deal
19 with that.

20 Now BARM, Your Honor, could make this very -- I --
21 in a sense simple and say, Judge, we will not deal with
22 this. We will not -- notwithstanding whatever we said to
23 you before, we take it back and we commit that we are not
24 going to distribute anything or attempt to distribute
25 anything to our members until the -- this involuntary

1 proceeding has been determined in all of its respects and
2 assuming, if the case is to go forward in bankruptcy, until
3 given a certain period of time for a trustee to be appointed
4 and for a trustee, you know, to be able to get up to speed
5 and to figure out what they do so that it's a level playing
6 field.

7 BARM could make it very simple. If they say that,
8 then I still may in theory may be entitled to the discovery,
9 but fine. At least then we can say, okay, we'll wait.
10 We'll wait because why spend money needlessly, right? But
11 as it stands right now, Your Honor, they cannot have their
12 cake and eat it. I think it boils down to something that
13 simple.

14 So, Your Honor, we would want to go forward. We
15 did not ask for depositions. Our purpose here is not to
16 harass. We want to start off getting the documents. The
17 documents apparently exist. The information exists.
18 They've been sharing it with Mr. Januzzi. So we would like
19 to start off, take it piece by piece and see where we go, or
20 as I said there's an easy alternative; for Mr. Wasserman to
21 do what I asked him to do in a letter back in September
22 which started his whole thing, just please commit that you
23 won't distribute anything until all aspects of the
24 involuntary case have been determined. One or the other.

25 Thank you, Your Honor.

1 THE COURT: So let me just make sure I understand
2 the thrust of your 2004 examination. We all understand
3 that, yes, the rules say that, you know, any party in
4 interest can request Rule 2004, you know, the affairs and
5 the administration of the estate.

6 You're requesting this discovery in order to
7 "intelligently respond, if needed, should BARM notify the
8 Court that it intends to make a distribution to its
9 members." So, in essence, you feel that you need this
10 information to the extent that BARM decides to make this
11 distribution and you decide that you need to somehow, some
12 way seek to enjoin the distribution of those --

13 MR. KIRSHENBAUM: Correct.

14 THE COURT: -- assets.

15 MR. KIRSHENBAUM: Correct. And I have to show,
16 Your Honor, that there -- if I commence an action I would
17 like it not to be this case. As an advocate you would
18 always like, you know, to have as many, you know, weapons in
19 your holster as you possibly can have. I would love to be
20 able to come into court -- if I have -- if we -- and it's
21 not just me alone, but me together with all the other
22 movants if we -- if we're informed that BARM -- BARM gives
23 this Court notice that it intends to distribute and we feel
24 we're going to come into court to attempt to enjoin it and
25 again, presumably, because of the nature of the way an

1 adversary proceeding moves forward, even on an expedited
2 basis, I'm assuming, Your Honor, that we would certainly
3 want to come into court and ask for some type of interim
4 relief.

5 And, Your Honor, I and my colleagues are very
6 cognizant that the burden will be on us to establish the
7 likelihood of success on the merit in connection with any
8 interim relief that we request and any -- and any
9 restraining -- temporary restraining order, any preliminary
10 injunction which, of course, is always within the power to
11 -- of the Court to grant it, but only upon the establishment
12 of the standards that -- and the standards that we need to
13 meet.

14 How can I -- if I came into court, Your Honor,
15 they give you notice tomorrow that they're distributing and
16 we say, well, we have to try to stop that and we file a
17 complaint. Judge, please enter a temporary restraining
18 order. We -- we're going to be irreparably harmed. Well,
19 how can we -- how can you prove to me you're irreparably
20 harmed. You don't know anything.

21 So it's just -- it's just not a situation -- it's
22 just not a situation which right now leaves us in a position
23 to do anything effectively. If they were to be given the --
24 the way things were to work out that they were to be given
25 the latitude, the opening to move forward and distribute

1 before we had an opportunity to have the information and to
2 utilize information in connection with (indiscernible)
3 before the Court. I think, Your Honor, to me this one is
4 just so clear. I don't understand how it's open to,
5 frankly, a legitimate dispute.

6 And as -- and in particular, again, when you go
7 back I would -- frankly, I would be probably coming in and I
8 would be asking for 2004 discovery even if Mr. Barkany had
9 done -- had been represented by counsel and, you know,
10 everything was documented and everything seemed to have been
11 -- you know, all the I's dotted and all the T's crossed. I
12 probably would still be asking for this, Your Honor.

13 But when you add on top of just the fact that
14 creditors that have an interest are entitled to information
15 generally, when you add on top of it the way this all came
16 about --

17 THE COURT: Well, why wasn't that interest raised
18 on the very first day? Why weren't the creditors concerned
19 -- you knew that BARM held all these assets on day one.

20 MR. KIRSHENBAUM: Right.

21 THE COURT: Why weren't the creditors concerned
22 that at some point those assets were going to be
23 distributed, maybe we should move for the appointment of a
24 trustee?

25 MR. KIRSHENBAUM: Your Honor, I -- if I -- first

1 of all, Your Honor, I must tell you, I must tell you that
2 when we filed the bankruptcy, the involuntary bankruptcy
3 petition it was our view, it was our view that between the
4 filing of the bankruptcy petition and the fact that there is
5 a criminal proceeding pending and there is an interim
6 forfeiture order pending, it -- you know, I -- you know, I'm
7 no smarter than anyone else and maybe not -- nowhere near a
8 lot of other people, of course, but it never dawned upon me,
9 it never dawned upon me under the circumstances of an
10 involuntary filing which does act as an -- as an automatic
11 stay. The automatic stay does come into play when an
12 involuntary is filed and during the entire gap period.

13 And between a bankruptcy filing and an automatic
14 stay, a criminal proceeding, an interim forfeiture order
15 followed by a final forfeiture order, the debtors -- the
16 debtor/defendant's counsel saying, you know, there are all
17 sorts of issues concerning values and so forth, it never
18 dawned upon me, Your Honor, that this -- that BARM would
19 even think about distributing assets to its members until
20 mid-September when I heard in -- again, third-hand, that one
21 of the BARM members had said, we're getting a distribution.

22 Frankly, Your Honor, when I heard that, I was
23 absolutely floored. And that's why (indiscernible), but
24 that's why I sent a letter to Mr. Wasserman because I was
25 hoping, Your Honor -- I mean, frankly, expecting that once I

1 made that inquiry that the response would be, we're not --
2 we're not distributing anything, but quite the contrary. I
3 was surprised.

4 So as soon as we learned that, Your Honor, we came
5 in -- we came into court. I never, ever expected that it
6 would come to this.

7 But, Your Honor, I don't know that today is any
8 different than if we had anticipated it on day one I'm sure
9 we would -- that we would have been here. But whether it
10 was a request on day one, had we known that it would have
11 been an appropriate request on day one. And we know -- we
12 knew about it at the end of September and that's why we
13 requested this at the end of September from them.

14 So, Your Honor, if -- you know, there is any, you
15 know, blame to be apportioned here for not moving sooner,
16 I'll, you know, take the -- I'll take the blame for that.
17 But I -- candidly, Your Honor, I never would have -- I never
18 would have thought that they would attempt to distribute
19 assets.

20 And, again, I don't know that there's any
21 prejudice. They've been holding this out -- they've been
22 holdings these assets for four years. Why all a sudden the
23 rush? They've been holding them for four years.

24 THE COURT: Thank you. I'll hear from Mr.
25 Wasserman, but I'll just pick up on something that Mr.

1 Kirshenbaum said. I am looking forward to the moment where
2 we do have some admissible evidence to present to the Court.
3 Not that I haven't enjoyed the arguments of counsel, but I'm
4 looking forward to that moment.

5 In any event, Mr. Wasserman.

6 MR. WASSERMAN: Where do I begin?

7 Each time counsel appears before Your Honor, he
8 makes a point of noting that Mr. Barkany entered into
9 agreements and turned over money without representation by
10 counsel.

11 One, during the period of time where monies were
12 turned over he was represented by counsel, not during the
13 entire period, but during portions of that period.

14 Secondly, for quite some time now Mr. Barkany has
15 been represented by very able counsel. They have never
16 stated that objection or that concern.

17 Moreover, they didn't make the argument in the
18 criminal court that the monies were turned over or the
19 confession of judgment was made under duress. They didn't
20 challenge it because Mr. Barkany was not represented by
21 counsel. And the government filed a criminal complaint and
22 ultimately obtained a guilty plea based on all of the things
23 that Mr. Kirshenbaum, perhaps, if he were representing Mr.
24 Barkany would have challenged. But his attorneys haven't.
25 The government relied on it. You heard Mr. Caffaroni speak

1 last time we were here. I would like not to hear that
2 again, if at all possible. It's irrelevant.

3 And even -- even Mr. Kirshenbaum noted, he would
4 still be here making the argument even if Mr. Barkany had
5 been represented by counsel.

6 There's a lot that counsel claims they don't know.
7 But they're being modest, to be polite. If you read their
8 papers that they submitted, let's look at their moving
9 brief. This is what they know. And by the way, in their
10 reply papers, I'm not a regular in this court, Your Honor.
11 They served the papers late. We would ask that the Court
12 reject their reply papers. And if the Court doesn't do so,
13 at least give us an opportunity to submit a supplemental
14 declaration or whatever people call it.

15 I've looked at the local rules. I've counted
16 every which way I can. The papers are late. Mr.
17 Kirshenbaum and his colleagues are experienced enough to
18 know you need to get papers in on time.

19 So here's what they say in their brief, which is
20 all relevant and material to the issue before you: "BARM
21 has exercised complete, unfettered and unsupervised dominion
22 and control over the transferred Barkany properties since
23 its receipt of said properties." They say that at pages 2
24 and 3 of their brief. That's absolutely true. We don't
25 dispute it. It's an important fact.

1 At page 2 they say, "Petitioners acknowledge that
2 Mr. Barkany turned over all of his properties to BARM some
3 months after November 2010." Also, absolutely true. It's a
4 correct factual statement. It's another thing they know.

5 At page 3 of their memorandum, "The petitioners
6 filed this involuntary bankruptcy petition on June 25th,
7 2014." Absolutely true. What's also true is that they
8 filed years after the petitioners claimed that Mr. Barkany
9 transferred the assets to BARM.

10 At page 5, petitioners have correctly noted that I
11 fully disclosed to counsel and to this court that it is
12 BARM's expectation that before year-end they will make a
13 partial distribution. Absolutely true.

14 At page 5 -- I'm not going through their entire
15 brief, Your Honor.

16 At page 5 petitioners correctly state that "BARM's
17 position is that it has a legal right to distribute the
18 assets to its members without obtaining the advance approval
19 of this Court." I've made that clear. That's always been
20 our position.

21 Again, I'm not -- I'm not a bankruptcy attorney,
22 so hopefully I'll get these phrases correct.

23 THE COURT: Soon you'll be a regular here.

24 (Laughter)

25 MR. WASSERMAN: I would like to think we could

1 resolve it before I become a regular. But -- and there's
2 still --

3 THE COURT: The Court hopes that would be the
4 case.

5 MR. WASSERMAN: -- there's still hope for that.

6 My understanding is that the funds and the
7 property that Mr. Barkany transferred to BARM are not the
8 property of the estate. If you look at the chronology of
9 events that are known to Mr. Kirshenbaum and the other
10 petitioners, all of those transfers occurred well outside of
11 the 90 day preference period. They were beyond the one-year
12 period. Looking at the various rules which might allow for
13 a challenge to those transfers, I don't see that any of them
14 apply.

15 Now I will say that there is perhaps \$10,000 which
16 might apply and we've readily agreed to turn that over. But
17 any property held by BARM was transferred to BARM long
18 before the commencement of this case. And, again,
19 petitioners do not dispute this.

20 We don't believe that BARM has any material
21 preference exposure under Section 548. BARM is not an
22 insider. Nobody has suggested that we are. Any funds that
23 BARM received during the 90-day preference period were
24 received pursuant to assignments made long before the 90-day
25 period.

1 Furthermore, to the extent BARM did receive funds
2 -- and we're talking something in the neighborhood of
3 \$10,000 or so during the 90-day preference period, that was
4 pursuant to assignments which occurred prior to the 90-day
5 period. So in both of these situations, what BARM obtained
6 during the 90-day period was not the property of Mr.
7 Barkany.

8 Now the amounts that could --

9 THE COURT: I think -- I didn't mean -- mean to
10 interrupt you, but I think maybe what Mr. Kirshenbaum -- I'm
11 interrupting you for the purposes of maybe you'll address
12 this. Mr. Kirshenbaum may also be thinking of transfers
13 that were well outside the 90-day period looking back six
14 years with respect to any potential fraudulent conveyance or
15 fraudulent transfer by Mr. Barkany.

16 So I don't know if, you know, you wanted to
17 address that, but that might be one of the points that Mr.
18 Kirshenbaum would be looking at, not so much an avoidance
19 action. And I don't mean to belittle any avoidance action
20 in the 90-day period. But not so much an avoidance action
21 as a preference in the 90-day period, or to the extent it's
22 an insider, one year, but a look back period either under
23 the Bankruptcy Code, which would be two years under 548, or
24 looking back six years by utilizing Section 544 of the
25 Bankruptcy Code and then the New York State Debtor/Creditor

1 law.

2 So he -- he may be interested in looking at a
3 series of transfers or the transfer that occurred during
4 that, you know, six-year look back period. And I think his
5 concern was that there may have been transfers of Mr.
6 Barkany's assets or property that were unrelated to the
7 fraud, were unrelated to the scheme to defraud.

8 And that the concern that he has, at least my
9 understanding, is that those assets may not be part of the
10 government's overall forfeiture issue and because these
11 aren't assets that would have been purchased or gleaned as a
12 result of the proceeds of the fraudulent scheme. And I
13 think he's looking for a look back period greater than the
14 90 days.

15 MR. WASSERMAN: Well, I don't think if you look a
16 the information that he's requesting that he has zeroed in
17 on that. His requests seem to be far broader than that.

18 THE COURT: Well, I -- I should tell you -- and
19 maybe this might help you a little bit with respect to the
20 information that is requested. It's the policy of this
21 court that when a party moves for a Rule 2004 examination or
22 a production of documents, we don't just simply say, go
23 ahead. You've got a laundry list of documents. Enter an
24 order directing the other side in accordance with Bankruptcy
25 Rule 2004 to produce all of those documents.

1 What this Court does is we just authorize the
2 issuance of a subpoena so that it does not abridge the
3 rights of the responding party to look at that subpoena,
4 make a determination as to whether or not a protective order
5 is -- should be in place or whether or not a motion to quash
6 the subpoena should be in place.

7 So to the extent that a Rule 2004 order would be
8 issued by this Court it is not going to abridge the rights
9 of BARM or whatever responding party is going to be the
10 subject of a 2004 to move for a protective order or to
11 quash. It's not an automatic right. Parties are given the
12 opportunity.

13 MR. WASSERMAN: Well, that's reassuring, Your
14 Honor.

15 Before I forget, the one case that counsel cites
16 to, In re: DeLorenzo (ph), that involved an involuntary
17 Chapter 7 case where one of the petitioning creditors was
18 concerned that the alleged debtor, the alleged debtor --
19 we're not the alleged debtor -- would transfer estate assets
20 to family members.

21 And counsel goes on to say, "Thus, the DeLorenzo
22 case squarely states that if there is a fear that an alleged
23 debtor will transfer property during the gap period, then
24 Rule 2004 discovery on that subject is not only permissible,
25 but it should be taken."

1 We're not the alleged debtor. He's not seeking
2 discovery from Mr. Barkany. He's seeking discovery from
3 BARM. We're a creditor. We're a victim. So I don't see
4 that that case is applicable.

5 It seems to me that I would be -- I would be
6 stunned. Counsel expressed great shock at what we would not
7 agree to. I would be stunned if in his briefcase or
8 somewhere back in the office counsel did not already have
9 the motion for injunctive relief or whatever motion he
10 intends to file so that this Court will direct BARM not to
11 make a distribution.

12 To the extent that he might require additional
13 information, at best that's window dressing. And,
14 certainly, to the extent that he requires that information,
15 his motion can indicate that they requested discovery in the
16 context of the motion. It seems to me that we're putting
17 the cart before the horse here.

18 He wants everything. He wants to know everything
19 with respect to property which I will submit, Your Honor,
20 when we're -- all is said and done you will realize it is
21 not property of the estate, has never been and can never be.
22 So if he wants to make a motion for an injunction, let him
23 make that motion.

24 And in response to that, we will come forward with
25 the informational documentation that we're required to,

1 which might well provide the information he's seeking. If
2 it's insufficient or he feels there's information he needs,
3 at that time let him request the additional discovery, the
4 2004 examination. And you will then be able to put in far
5 better context and focus more sharply on given the motion
6 and given what we've said in response to the motion and what
7 we've come forward with, what precisely do you, Your Honor,
8 need to be able to decide whether or not to issue the
9 injunction or the temporary restraint.

10 Right -- yes. 2004 is a fishing expedition and
11 it's a license to go after most anything. I'm shocked and I
12 would be surprised if counsel would not want the Court to be
13 able to do what Your Honor has just suggested; that if you
14 give -- were to give them permission to go forward and serve
15 the subpoena, that's not a license to request anything that
16 they want and we would certainly have the right to object.

17 What I'm suggesting, Judge, is you're able to do
18 your job better with respect to what they want done here if
19 they are required to make whatever motion they deem is
20 appropriate with respect to the assets. If they want an
21 injunction, so be it. We will respond. You will clearly
22 see the issues and how they have been framed.

23 And to the extent that they're concerned about
24 what the judge said in the DeLorenzo case, and I'll quote,
25 "The lack of evidence is particularly glaring because

1 Chadbourne has not even attempted to obtain discovery on
2 these matters from DeLorenzo." Well, that statement will
3 not apply. You will not be able to, in a decision when you
4 deny their request for injunctive relief, you'll not be able
5 to say that your -- it's a glaring omission that they didn't
6 even try to get to discovery because they have tried. And
7 you in your considered opinion and discretion will have
8 simply deferred their attempt to get the discovery until a
9 proper motion was before you for the relief they are really
10 seeking so you could put that discovery in context.

11 I will -- and perhaps it's presumptuous of me to
12 suggest what would be helpful to you and what you should be
13 doing. But the money that we have was recovered pursuant to
14 a judgment that was entered in the State Court and that
15 judgment has been relied on by the U.S. government.

16 The suggestion that somehow that money was being
17 collected for the benefit of all who might someday come
18 along having sat on their rights is to me shocking. What
19 kind of message is being sent to victims of a fraud? We
20 were victims. We approached the person who victimized us
21 after he had confessed and after it was known that he had
22 perpetrated a massive Ponzi scheme, and we worked with him,
23 which is what the government encourages. They encourage
24 victims to seek and obtain relief without the involvement of
25 the government if at all possible. And we did that. And we

1 obtained the judgment and we recovered money pursuant to
2 that judgment.

3 Now we're being told, but we knew that BARM
4 existed and we knew for years that BARM was collecting
5 money, but we sat back and we waited and we waited. But now
6 that you've collected \$20 plus million, now we want our
7 piece of the pie.

8 And lest the Court forget at I think it was our
9 last hearing, and it's not evidence, but if required to we
10 would demonstrate that Mr. Rosenberg gave approximately
11 \$500,000 to Locke Lord for BARM. He knew about it.

12 Mr. Kirshenbaum, before he came to this court, he
13 was in Religious (sic) Court on behalf of certain of his
14 clients. He didn't think Bankruptcy Court was the first
15 place to go. He went to Religious Court first. They sat
16 and they let BARM do the work. Everything BARM has done has
17 been to the letter of the law. They now want to reap the
18 benefits of BARM's work and now suggest that somehow BARM
19 has behaved in an unseemly fashion.

20 Yes. There's information that they may well need,
21 but they haven't demonstrated that, Your Honor. Let them
22 make whatever motion they deem appropriate. And by the way,
23 if they sought an injunction you would not grant it. I'm
24 confident of that. They do not meet the standard.

25 The last thing I will note is -- and Mr.

1 Kirshenbaum noted this. There's no prejudice to BARM, he
2 says, because BARM has had the money for four years. I
3 think the four years weighs against the relief that he's
4 seeking.

5 Moreover, it speaks to the credibility and
6 integrity of BARM. The day that he commenced the --
7 actually, the day that he commenced the action in Religious
8 Court we could have distributed the monies. We could have
9 done it any time during those four years. We haven't been
10 running. We haven't been hiding. But we've never shied
11 away from our belief and our conviction that the money is
12 ours and we can distribute that money.

13 Now what -- among the things that Mr. Kirshenbaum
14 did not suggest BARM could do to make everything easier, but
15 it is something that I will suggest and I suggested it the
16 last time I was here, and we've also raised this with the
17 government. We believe since there's approximately 22
18 million or whatever the amount is in assets and there's an
19 additional amount that is illiquid which we're working on
20 valuing, when we were here last, Judge, we -- you talked
21 about putting everything on hold for six weeks. And I spoke
22 perhaps out of turn and I said, I really don't want to be
23 here six weeks from now and here the parties haven't done
24 what you've directed them to do.

25 And that's precisely where we are. We provided

1 the government with all of the information they requested,
2 with the loss affidavits, the supporting documentation. The
3 petitioning creditors have not managed to do that in six
4 weeks. They're here to delay and delay and delay, to wear
5 us down until at some point we throw up our arms and we give
6 up on the actions that we commenced against them in State
7 Court where they do have exposure. And at that point this
8 will all come to an end.

9 One final thought is with respect to an
10 injunction, we don't believe they would be entitled to it.

11 With respect to any type of adversary proceeding,
12 I don't understand why Mr. Kirshenbaum is shocked that
13 that's what we think would be required.

14 That's all I have, Your Honor.

15 THE COURT: So you're saying that the 2004 request
16 is premature because even though you have a stated intention
17 -- and I'm going to ask you about that stated intention in a
18 moment -- to have BARM make a distribution, no determination
19 with respect to that distribution has yet to be made. And
20 you're saying that certainly Mr. Kirshenbaum and his clients
21 would not be prejudiced because they would have the
22 opportunity to seek whatever appropriate remedy or relief,
23 whether it's in this Court or in the District Court, with
24 respect to any distribution of those assets.

25 So you're saying that the 2004, the discovery is

1 premature?

2 MR. WASSERMAN: Yes, Your Honor.

3 THE COURT: Okay. Thank you.

4 MR. KIRSHENBAUM: Your Honor, a few points that I
5 think just are important to complete the record.

6 First of all, Your Honor, in our initial motion
7 papers we included various exhibits to our initial motion
8 that were included in -- together with the affidavit of my
9 colleague, Mr. Agudelo, and Exhibit 5 is the letter that we
10 sent to -- or the email that I sent to Mr. Wasserman and to
11 Mr. Jacob on the evening of October 2nd.

12 And in that letter, Your Honor, I delineated seven
13 categories -- I'm sorry -- eight categories of document
14 information that we were requesting with respect to this
15 issue, very tailored, very specific in terms of what we were
16 asking for. And, again, we made it part of our initial
17 motion so that Your Honor would see that we didn't simply
18 come running into court for 2004 relief, although we could
19 have. But we tried to get this matter resolved, but they
20 just ignored our request for information.

21 Your Honor, in addition I want to point out that
22 in the hearing on September 30th, the last time we were in
23 front of the Court, Mr. Caffaroni agreed with our position
24 that there should be no distribution at the present time.
25 In fact, he said, and I'm quoting from page 57 of the

1 transcript of the September 30 hearing, and this is -- he's
2 talking to -- he's addressing the Court about the general
3 process and the general forfeiture process and the process
4 of trying to locate victims and so forth.

5 And he says, Your Honor, beginning at line 18 on
6 page 57, "I would also suggest that to the extent Your Honor
7 has the authority that it would seem to make sense that no
8 distribution, if Your Honor can order them or direct them
9 not to make distributions while we compile that list to
10 ensure that everyone is -- gets an opportunity to be heard,
11 that would seem to make sense so that we don't have to worry
12 about one victim getting excluded. And so that would be a
13 suggestion of mine.

14 Now then he went on to say that he was -- he was
15 suggesting a four to six-week period to get in the proofs of
16 loss, the affidavits of loss and so forth. But I think,
17 Your Honor, that statement of Mr. Caffaroni is quite clear
18 that he is in agreement that to the extent that this Court
19 has the authority, the appropriate result would be for the
20 Court to enjoin any distribution.

21 Now whether the Court, Your Honor, has that
22 authority and under what provisions of the code that
23 authority may exist, that's not before the Court today.
24 That's not before the Court today. And, Your Honor, I can
25 stand up here and say all sorts of -- make all sorts of

1 claims and accusations against BARM and that wouldn't be
2 evidence. Your Honor really couldn't take any of that into
3 account.

4 And similarly, Your Honor, BARM can stand up in
5 front of the Court and say, we're not an insider. The
6 insider rules don't exist. There's no basis for equitable
7 subordination. That doesn't exist. We received valid
8 assignments. It's very nice that Mr. Wasserman stands up
9 and tells the Court -- this -- he's making your job easier.
10 Judge, you don't have to look into what we've done. I'm
11 telling Your Honor that we have valid assignments and
12 everything that we got is -- we got it. We're entitled to
13 it. They don't have a claim to it.

14 That's not his job. That's your job. That's your
15 job.

16 In the DeLorenzo case, the debtor was still
17 holding the assets. The debtor was proposing to distribute
18 the assets. The law firm, one of the petitioning creditors
19 was concerned about that. Obviously, Judge Garretty said,
20 since it's the creditor that you're worried about -- since
21 it's the debtor that you're worried about in terms of an
22 inappropriate distribution, you should be taking -- you
23 should have taken discovery of the debtor.

24 Well, obviously, there since it was the debtor
25 that was holding it, that -- the debtor was the appropriate

1 target, if you will, for lack of a better term or subject is
2 a better term of a Rule 2004 examination.

3 Here, we're not concerned about Mr. Barkany making
4 a distribution or we would be taking a 2004 examination or
5 seeking the 2004 examination of Mr. Barkany. Here, he
6 turned over everything, lock, stock and barrel to BARM, to
7 their lawyers, to their accountants pursuant to agreements
8 that we haven't seen. Maybe. Maybe there aren't even any
9 agreements. Maybe there are no assignments. I don't know
10 what there may be. Your Honor doesn't know what there may
11 be. But Mr. Wasserman tells you, Judge, don't worry because
12 if they were to ask for an injunction you wouldn't give it
13 to them.

14 I mean, Your Honor, I -- with no disrespect that
15 is not a valid argument. He's telling you, you don't have
16 to worry. He's telling me, you have nothing to look at
17 because everything's good. Everything's fine. I've got
18 everything and I got everything pursuant to agreements that
19 are absolutely bullet proof. They are rock solid, and we
20 did everything correctly. And so, therefore, you have no
21 basis to hold us as an insider and you have no basis to
22 equitably subordinate. I don't have a clue as to any of
23 that, Your Honor. The Court doesn't have any idea, has no
24 information and --

25 THE COURT: Well, it's as I said. There's no

1 admissible evidence. While Mr. Wasserman, as expected,
2 makes a cogent argument --

3 MR. KIRSHENBAUM: Right.

4 THE COURT: -- I can only assume that at some
5 point, to the extent we have to litigate these issues, he is
6 going to have evidence in admissible form to convince us
7 that his argument is correct.

8 MR. KIRSHENBAUM: That's correct, Your Honor.

9 THE COURT: And I'm assuming that you'll have --

10 MR. KIRSHENBAUM: But we -- what we need --

11 THE COURT: -- you'll have --

12 MR. KIRSHENBAUM: -- what we need --

13 THE COURT: -- similar evidence.

14 MR. KIRSHENBAUM: -- is status quo. That's -- we
15 need a status quo and I can't -- I -- if Mr. Wasserman wants
16 to agree that if we -- if he goes forward with his stated
17 intention and we file an adversary proceeding to block him,
18 that he goes on the record today on behalf of BARM saying,
19 Judge, if they file an adversary proceeding we will not
20 distribute until the adversary proceeding is concluded, then
21 I'll wait six weeks. We're kind of just -- we're spinning
22 our wheels, Judge. I mean, what are we gaining?

23 But I'll wait. I'll wait till he sends the Court
24 -- he sends Your Honor the written notice. We'll file our
25 complaint, and if he agrees he won't distribute so long as

1 the complaint is filed, fine. We'll wait the six weeks.
2 Maybe he'll change his mind. Maybe he'll wake up tomorrow
3 and say, you know what, I'll wait till after the bankruptcy
4 is over.

5 But how can he possibly suggest -- I -- it's
6 almost an insult. He suggests that he'll -- we'll file our
7 complaint and then we'll -- then we'll start to get what we
8 need. But in the meantime he distributes because Your Honor
9 won't be able to enter any type of restraint because we
10 can't make out any type of a case.

11 Your Honor, I think that this record is abundantly
12 clear that we're entitled to everything we're asking. And,
13 again, I certainly agree with the Court. We would serve a
14 subpoena. We'll serve a subpoena. We will delineate
15 exactly what categories that we want. We're prepared to do
16 it very quickly. I would certainly, Your Honor, endeavor to
17 get that subpoena to Mr. Wasserman Monday at the latest.
18 And give him a few days to object. We'll try to work it
19 out. And then we'll deal with it.

20 But I need to deal with it within the time frame
21 that I can get the documents in time to be able to utilize
22 them to come into court and make a cogent case and not
23 insult the Court, just speaking things without proof, but
24 making a case to this court that I believe Your Honor will
25 stand. And right now I can't do that and there's no way we

1 can do that and that's exactly what 2004 is there for.

2 That's exactly what it's there for.

3 So, Your Honor, I suggest, Your Honor, that the
4 record is clear and I would urge the Court to enter the
5 order so that we don't -- we don't lose any more time. We
6 don't lose any more time, Your Honor, and I don't want to
7 get into things about late filings or anything. You know,
8 the bottom line is, Your Honor, they had -- they had many
9 weeks to respond. We were very generous in the time we gave
10 them to respond. Yes, they said, we served the initial
11 motion on the eve of a holiday. Yes, we did, because that
12 was as quickly as we could get the papers out.

13 And we gave them, Your Honor, ultimately weeks to
14 respond. And I gave them, Your Honor -- we didn't have to
15 do this. I gave them till last Thursday to file their
16 opposition papers. They had weeks. But I was very
17 specific, Your Honor, that the papers had to be filed by
18 5:00 on Thursday. There was a reason for that, Your Honor,
19 because 5:00 that would still give us Thursday night to
20 start working on the reply papers. They served the reply
21 papers, they filed the reply papers 11:59. Now these are
22 not such complicated reply papers, Your Honor. So basically
23 we were not -- we lost Thursday night.

24 Your Honor is aware that basically I'm a Sabbath
25 observer. The days are very short. We basically had to

1 start working on those papers, Your Honor, on Sunday and
2 Monday. We didn't get those papers in till Tuesday. Those
3 papers, again, are very simple. They say let -- they have
4 no right -- they would have had no right to reply, a
5 surreply if he filed it on Monday. They should have no
6 right for a surreply on Tuesday.

7 Mr. Wasserman has said nothing which rebuts our
8 entitlement to take this 2004 examination, and I would urge
9 the Court, Your Honor, to enter the order today so that we
10 can start moving forward and getting some progress. I don't
11 know what they're afraid of. You know, the more they yell
12 and scream, we don't want to give them the documents, we
13 don't want to give them the documents, it makes you wonder
14 why they don't want to give us the documents. What are they
15 afraid of? They've got documents. They've got properties.
16 Let us see it. What are they afraid of? If I got document
17 -- if I was going to move forward, I wouldn't be afraid if
18 they're okay. Take them. Look at them. Look them upside
19 down, inside out, anyway you want.

20 If there's something wrong, Your Honor, then we're
21 -- we are entitled to bring it to the Court. If after
22 reviewing the papers we think, you know what, they have an
23 entitlement to move forward, I guess we'll have to swallow
24 it. But we're certainly entitled to understand that and to
25 examine that.

1 THE COURT: Thank you. I would like -- also, I'll
2 give you the opportunity and that will be it -- the
3 opportunity for Mr. Wasserman to respond. But one of the
4 things, do indeed address the issue of the stated intention
5 to possibly make a distribution of those assets. And, also,
6 I did recall -- that's what I was looking at as well -- what
7 Mr. Caffaroni, if I'm pronouncing his name correctly, had
8 said at the last hearing about how it would be better to
9 wait on the distribution until we sort of know the universe.
10 And I'm assuming that Mr. Wasserman would say, well, you
11 know, we complied with the request of the U.S. Attorney and
12 got our information there. And so why should someone be
13 rewarded for delaying in getting their information.

14 So you don't have to make that argument. But I do
15 want to know the issue of the potential distribution and how
16 it sort of reconciles with the thrust of what the U.S.
17 Attorney's Office is also trying to have done here with
18 respect to the universe of the victims.

19 MR. WASSERMAN: Very good.

20 I actually got sidetracked. Mr. Januzzi was
21 clicking is pen and I lost my train of thought earlier.

22 (Laughter)

23 MR. WASSERMAN: I was talking about -- sorry.

24 THE COURT: Don't break his concentration.

25 MR. WASSERMAN: I was talking about what we would

1 offer to break through the log jam and what I would think
2 would be acceptable to the court, to the government and
3 ultimately to the petitioning creditors.

4 I would begin with the fact that, one, the Borgata
5 is not a victim of the Ponzi scheme. The amount they seek
6 is roughly \$240,000. And that obligation will be discharged
7 in this court. I've looked at an abundant number of cases
8 and that's a dischargeable debt and I expect it would be, or
9 it will be so far at the end of the line that they will
10 never see a penny.

11 With regard to Mr. Rosenberg, I think what we
12 heard today is that his claim is approximately \$479,000 with
13 some change up to the date of Mr. Barkany's arrest.

14 With regard to Mr. Kessler, we've been told the
15 net loss is \$68,924.53.

16 And then I think this is with respect to Mr.
17 Rosenberg, post-arrest amounts, money that he's given to
18 support Mr. Barkany and his family, if you total that with
19 the \$479,000 I believe the number was approximately \$682,000
20 and change. So if you take the 682,000 and change, you take
21 the \$68,900, you're well under a million dollars.

22 What we were speaking to the government about, and
23 in the past I've spoken to other parties involved in this
24 litigation and if Mr. Caffaroni were here he would verify
25 this and perhaps he will the next time we're here. And this

1 is something that I had proposed to the Court. We have no
2 objection to holding back an amount of money that would be
3 sufficient to cover and then some the claims of the
4 petitioning creditors. We would even go so far as to double
5 that amount so that we would also cover the claims of any
6 people in the universe of potential creditors. Although I
7 will say with the information that we provided to the
8 government, we don't believe that that amount would even
9 approach a half a million dollars.

10 Ultimately, we believe we have the right to make
11 the distribution. For tax reasons we will need to do that
12 before year end. And we have no objection to holding back
13 amounts that would be sufficient to satisfy the claims of
14 the petitioning creditors.

15 I would be happy to put a more formal proposal in
16 writing. I intend to raise this proposal with numbers. I
17 told Mr. Caffaroni when we last met that I would try to put
18 pen to paper. What I couldn't do is because I didn't have
19 the information is how much the petitioning creditors were
20 actually claiming. If you believe -- if you remember, their
21 petitions say not less than or something like that. We now
22 have the amounts. We're willing to make sure that we cover
23 those amounts and then some.

24 So our intention is ultimately to put the Court
25 and to put the petitioning creditors in a position where, in

1 essence, it's like posting a bond. We will make sure that
2 whatever money is necessary to satisfy their claims, no
3 matter what the result in these bankruptcy proceedings, that
4 money will be set aside. The balance we do intend to
5 distribute. We believe we have the right to do so and we
6 don't believe there's -- there is a proper motion before
7 this Court that would prevent us from doing so.

8 Did I address your question?

9 THE COURT: You certainly addressed the issue of
10 the distribution and I'm assuming that Mr. Kirshenbaum now
11 has to make a determination whether or not he wants to move,
12 as I said whether it's in this court or in the District
13 Court, for whatever relief he believes he needs to prevent
14 that distribution, but also take that into account that the
15 proposal -- and obviously it's not in writing. It hasn't
16 been submitted to you and I'm assuming that that would
17 happen. There's the proposal to set aside a reserve to
18 cover the potential claims of Mr. Rosenberg and I guess it
19 was Mr. Kessler, but not for the Borgata, but that's
20 something that --

21 MR. WASSERMAN: We would --

22 THE COURT: -- the parties can discuss if this
23 ever proves to fruition with respect to reserving funds.

24 MR. WASSERMAN: We would even include funds
25 sufficient to cover the Borgata's claim. I will go even

1 further, Judge, what -- this is a -- this is a complicated
2 case. It has become very complicated. There are a lot of
3 moving parts.

4 But what we were -- what we were hopeful of doing
5 is if we could put aside sufficient funds to cover the
6 claims of the petitioning creditors, I would also say with
7 regard to the Northern Canada victims, the victims of the
8 second fraud, we've already discussed with them and we've
9 shared this with the government as well, there are certain
10 amounts that we received which they claim clearly came from
11 their clients. And we will, subject to the government and
12 the Court's approval, we will either return those monies to
13 them or include them in some sort of escrow arrangement.
14 They think the amount is higher than the amount that we've
15 identified. We are working with them on that.

16 I will also work with Mr. Kirshenbaum or any of
17 the counsel for the petitioners towards coming to an
18 agreement on concrete numbers. I think we can address the
19 actual dollar amounts and then some that the petitioning
20 creditors are seeking.

21 Where it becomes difficult, and I'm not sure I
22 know the answer to this yet, but we're working on it is it's
23 always been our position that the reason we're in this court
24 is because we commenced lawsuits against the petitioners and
25 to stop those lawsuits to have the stay go into effect they

1 commenced this action. So, ultimately, setting aside the
2 amounts that would cover their direct losses that they claim
3 doesn't address the larger issue of what happens to those
4 lawsuits and what happens to those claims.

5 We do believe, though, that if we're able to set
6 aside money to address their direct claims to make a
7 distribution to our clients, that will relieve a lot of the
8 pressure and tension and simplify what we have to deal with
9 going forward because, ultimately, what you will then have
10 is a limited number of lawsuits. And I think all of the
11 parties now have a clear sense of just how much they're
12 willing to spend to go to war over this, and perhaps with
13 that information it will inform all of our judgments as to
14 whether claims are worth pursuing, whether they should be
15 compromised and help us get there.

16 So what I'm suggesting is that -- I believe we are
17 making progress and there's a path towards the resolution of
18 this. And with respect to the Borgata issue,
19 notwithstanding the disagreements about the claim, we are
20 prepared to put money aside to make sure that that claim is
21 satisfied if they ever do end up with an enforceable claim
22 in this court.

23 But we do need to make a distribution, and I think
24 what I've outlined -- and, again, we're happy to present a
25 concrete proposal -- is more than sufficient to satisfy any

1 standard that would be necessary to protect the petitioners
2 and their claims here.

3 THE COURT: And the timing of that potential
4 distribution?

5 MR. WASSERMAN: I think the distribution is tied
6 somewhat to the accountants completing their work. They
7 need to file tax returns. The delay to some extent has been
8 -- and this is -- we'll elaborate somewhat on something
9 we've said in the past. Contrary to Mr. Kirshenbaum's
10 assertions, and I'm sure Mr. Caffaroni would support this
11 now that he has our documentation, our clients simply didn't
12 total up the money they invested and say, those are our
13 losses. Mr. Belski has been working for some time in trying
14 to determine precisely how much we're -- was received in
15 profits by each of our clients and how much they lost to
16 come up with a correct number. We've been working at that
17 for quite some time.

18 So until we had that number for each of our
19 clients we were unable to file the tax returns. There are
20 also issues related to valuation of property. It's far more
21 complicated than I can understand. The accounts appear to.
22 But we do see that there is a need to do something before
23 year-end.

24 THE COURT: Okay. Thank you.

25 Mr. Kirshenbaum, let's take a step back and deal

1 with this potential distribution which really now has been
2 more than a stated intention. They certainly expect that
3 they're going to try and make a distribution before year-
4 end.

5 So we take a step back and let's look at this from
6 just a practical standpoint. Let's be pragmatic. If the
7 Court were to grant 2004, that would be the authority for
8 you to issue the subpoena, which then would give BARM the
9 opportunity to move to quash the subpoena or to move for a
10 protective order.

11 But in the meantime I'm sure you're going to be
12 concerned by Mr. Wasserman's statement that they intend to
13 make this distribution. So then you would have to then, as
14 I said, either move in this court or move before the
15 District Court somehow, somehow seeking a remedy to prevent
16 the distribution of those funds. And to the extent you're
17 going to take discovery, that discovery is going to be
18 controlled by the Federal Rules of Civil Procedure. It's
19 not going to be controlled by the Bankruptcy Rule 2004.

20 So I'm trying to understand, are we just going to
21 engage in an exercise in futility.

22 MR. KIRSHENBAUM: I -- I don't see --

23 THE COURT: You're --

24 MR. KIRSHENBAUM: Judge --

25 THE COURT: Well, you're going to -- if I were to

1 grant the request --

2 MR. KIRSHENBAUM: Right.

3 THE COURT: -- for the 2004, you're going to issue
4 the subpoena. I'm assuming, since they've already said that
5 the documents that you're requesting they believe are
6 overbroad and are burdensome. And as I said they certainly
7 have the right to move to quash the subpoena or move for
8 protective order. But in the meantime, you still have this
9 issue of their potential distribution of these assets.

10 MR. KIRSHENBAUM: Your Honor, I can only do the
11 best I can do. There are litigations. Your Honor, when you
12 were practicing you were party to many of them where
13 discovery is done on a very, very expedited basis.

14 THE COURT: Understand that's --

15 MR. KIRSHENBAUM: These --

16 THE COURT: -- my point.

17 MR. KIRSHENBAUM: Right.

18 THE COURT: My point is, is that --

19 MR. KIRSHENBAUM: I'm prepared --

20 THE COURT: I mean, at some point you're going to
21 take a step back after today's hearing and realize that,
22 well, they may be moving to distribute these funds and now
23 you have to either say to yourself, okay, the proposal by
24 Mr. Wasserman is a fair proposal. He's going to reserve
25 sufficient funds to take care of or -- I am not making a

1 finding on this or a ruling. He is proposing to reserve
2 sufficient funds, actually more than sufficient funds to
3 capture the claims that Mr. Rosenberg, Mr. Kessler and even
4 the Borgata, you know, have here when he makes the
5 distribution.

6 You have to say yourself, well, are we satisfied
7 with that or should we seek some type of relief from the
8 Court, injunctive or otherwise -- I leave that up to you --
9 to prevent the distribution. And you may have to do that,
10 yes, on an expedited time table and ask for discovery on an
11 expedited time table, making the argument that we want to
12 enjoin the distribution, but we certainly need discovery in
13 order to make our case as to why we're entitled to the
14 injunctive relief or whatever other remedy you're going to
15 seek.

16 And what I'm trying to do is sort of minimize the
17 process here or the efforts and the costs. Are we going to
18 go through an exercise in futility of entering a 2004,
19 giving them the opportunity to oppose the document requests
20 under the 2004, and then suddenly be faced with a summons
21 and complaint and a motion seeking injunctive relief or some
22 other relief of which now you're going to ask for discovery
23 and partake in discovery under the Federal Rules of Civil
24 Procedure.

25 So then again, all of that may be -- maybe

1 ameliorated by your agreeing that the proposal that Mr.
2 Wasserman will submit in writing to both you and I guess to
3 the U.S. Attorney's Office about holding monies in reserve,
4 maybe that's acceptable to you.

5 MR. KIRSHENBAUM: I -- I'm not sure I'm
6 understanding Your Honor's question. I can only respond the
7 following, Your Honor.

8 I -- as I said, with all due respect I believe
9 that we are absolutely entitled to this discovery.

10 Given what BARM has stated in terms of their
11 intention, I would ask the Court right now to work out a
12 schedule. As I said, I'll commit to serve our subpoena no
13 later than Monday, I would ask -- they can put in their
14 objection to that -- it's going to list nine or ten
15 different categories of documents. No reason that they
16 can't put their objection to that Tuesday or Wednesday. If
17 they're going to -- they know right now they're going to
18 object, they don't want to give us anything.

19 THE COURT: They're going to have a period of
20 time. If the Court is inclined to issue the Bankruptcy Rule
21 2004 --

22 MR. KIRSHENBAUM: Right.

23 THE COURT: -- the order will be issued giving you
24 the authority to issue the subpoena --

25 MR. KIRSHENBAUM: Right.

1 THE COURT: -- and they are have a period of time,
2 14 days at least, within which to move to quash or move for
3 protective order. I'm got going to abridge their rights to
4 address the subpoena, just like by granting a 2004 I'm not
5 abridging your rights to seek the discovery. But it's not
6 going to be an issue where, you know, they're going to have
7 24 hours in a turnaround because we have to really look
8 again and they have to focus in on the laundry list of
9 documents.

10 And that's why my point was I don't want to have
11 the parties engage in an exercise in futility if within the
12 next four or five days you now seek to file some type of
13 pleading -- again, whether it's here in the District Court
14 -- file some type of pleading to enjoin the distribution of
15 those funds and then start discovery under the Federal Rules
16 of Civil Procedure.

17 MR. KIRSHENBAUM: Your Honor, they cannot -- based
18 on the agreement that we have they cannot seek to give the
19 notice to -- of an intention to distribute for another
20 couple of weeks, and then of course they have to give the
21 Court notice, presumably the Court has to give everyone else
22 notice.

23 And the fact that they say that they have to do
24 this because of tax concerns, that's always a tax
25 considerations, it's a great buzz word, okay? They -- they

1 are taking the position that telling Your Honor it's ours,
2 these are our assets, we own them, in fact we own them and
3 we're already talking to the Canadian northern people about
4 divvying them up, there are certain underlying assumptions
5 here that they're making that may be totally invalid.

6 And with no disrespect, Your Honor, they -- there
7 is sufficient time, even between now and the end of the
8 year, for them to deliver documents, agreements they can
9 certainly give, they've been already sharing information
10 with Mr. Jannuzzi, they can certainly hand over -- for
11 starters everything they've given to Mr. Jannuzzi.

12 There is no question that Your Honor has the
13 authority and it would be in my -- from my perspective, Your
14 Honor, completely appropriate for -- if -- for you to
15 establish a very, very tight timetable. If Your Honor is
16 starting off by saying that Your Honor would not require
17 them to respond to a subpoena for at least ten days, well, I
18 think then a timetable may be set up that may create an
19 impossibility. I don't know.

20 But I do know, Your Honor, that in appropriate
21 circumstances documents -- certainly now we're simply
22 talking about objecting to a subpoena so that Your Honor can
23 deal with any objections to the document production request,
24 and why they would possibly need ten days to file an
25 objection to a subpoena under these circumstances when they

1 are saying they need -- they are compelled to do the
2 distribution before the end of the year. If they want to do
3 that, if it's so compelling then they have the burden of
4 giving the other side what's necessary so that there'll be a
5 fair fight. It's just -- it's --

6 THE COURT: When I throw out the days,
7 Mr. Kirshenbaum, I was just telling you it's the general
8 policy --

9 MR. KIRSHENBAUM: Right.

10 THE COURT: -- of the Court with respect to the
11 2004 to provide the responding party with 14 days within
12 which to move to quash or file a protective order. I
13 certainly can tell you that that timetable has been -- has
14 been abridged in certain instances, so the Court would look
15 at that well.

16 My whole point that I guess started this
17 discussion was that I was concerned about parallel tracks
18 and parties wasting time. But if it's not the inclination
19 to immediately move for some type of injunctive or other
20 relief to present -- prevent BARM from distributing these
21 assets, and I saw that Mr. Wasserman sort of shook his head
22 when you said that they have several weeks left before they
23 can fulfill that stated intention to distribute the funds.

24 So, I don't know if you want to speak to that
25 particular point, because you did say that there's

1 additional time before BARM can give notice to say they're
2 going to distribute any of those assets.

3 MR. WASSERMAN: We have a disagreement as to the
4 timing. Your Honor, I'd prefer not to get into it at this
5 point.

6 I think I've made a proposal and a commitment to
7 this Court with regard to reserving money, which should
8 address every concern that Mr. Kirshenbaum has with respect
9 to the 2004 exam information that he needs or claims to need
10 at this time. He's concerned that we're going to make a
11 distribution that will prejudice his clients. We will put
12 aside the money to make sure that that doesn't happen. That
13 should resolve it.

14 To the extent that his real goal is that there
15 never be a distribution, which clearly is the goal, then the
16 2004 examination is totally unnecessary and redundant,
17 because he will move for an injunction, whether in this
18 court or the District Court, and he'll take whatever
19 discovery he's entitled to there.

20 MR. KIRSHENBAUM: Your Honor, the goal is, as we
21 said out front, that there not be a distribution here until
22 the involuntary proceeding is determined.

23 If this case, Your Honor, continues in bankruptcy
24 I think it would be hard to conjure a scenario where the
25 Court would not be in agreement that it would be completely

1 inappropriate for BARM to distribute the assets before all
2 these issues in terms of insider whether it's proper,
3 whether BARM really does own these assets, whether BARM did
4 engage in proper conduct or in inappropriate conduct, in
5 wrongful conduct. Well these are all very basic issues, and
6 if they're basic issues, if the case is in bankruptcy they
7 can't be any less basic during the involuntary period. They
8 can't. So it's not -- it's not necessarily Mr. Kirshenbaum,
9 there -- I don't know what other creditors there may be out
10 there.

11 Again, you've heard there has been no widespread
12 trumpeting, there having no banners, there have been no
13 headlines you have six weeks to establish your loss.
14 There's been no judicial finding in terms of what BARM's
15 real claims are. Mr. Belski determined the real amount is
16 \$50 million. I mean these are all things that ultimately if
17 the case stays in bankruptcy the Court decides, not them.

18 So yes, Your Honor, we are, if they're going move
19 forward, we will certainly seriously look into and try to
20 enjoin it if we think it's proper, but all that we're saying
21 now, Your Honor, and all that we've said since September --
22 since October 2nd when we sent them a detailed letter,
23 please give us the following categories of documents. The
24 fact that they just ignored it, they ignored it. They
25 totally ignored the request thereby forcing us to move for

1 2004 relief.

2 If there's -- it's so critical to them to have --
3 to distribute this year why did they ignore it? Why aren't
4 they giving us the documents?

5 MR. WASSERMAN: He's asked a question I'd like to
6 answer that question while it's fresh.

7 We were in this courtroom, Your Honor said there
8 will only be discovery with respect to Borgata, no
9 further --

10 MR. KIRSHENBAUM: That is completely -- that is
11 complete --

12 MR. WASSERMAN: -- or other discovery --

13 MR. KIRSHENBAUM: That's completely wrong, Your
14 Honor.

15 MR. WASSERMAN: -- in this case will go forward.

16 MR. KIRSHENBAUM: That's completely wrong. That's
17 completely incorrect.

18 MR. WASSERMAN: Well whatever the transcript says
19 it says.

20 MR. KIRSHENBAUM: That's correct.

21 MR. WASSERMAN: Two days later Mr. Kirshenbaum
22 woke up and decided I need some discovery from you.

23 MR. KIRSHENBAUM: The --

24 MR. WASSERMAN: He didn't ask Your Honor when we
25 were all here, he didn't make a motion, he said, I need

1 discovery from you, so he sought discovery from us, that was
2 two days -- I believe it was two days after we were here.

3 So it's not that I ignored the letter, Your Honor
4 had made a determination, we construed it as meaning that
5 you had decided what discovery would go forward and what
6 wouldn't, and quite frankly, I can't respond to every
7 thought that Mr. Kirshenbaum has that occurs to him.

8 THE COURT: I think the context of that is that
9 that was in the context of obtaining discovery against
10 Rosenberg, Kessler, and Borgata, and we were just trying to
11 limit the parties resources and the expense necessary. We
12 thought we would address the Borgata claim and that might
13 moot the discovery that would be had with respect to Kessler
14 and Rosenberg.

15 MR. WASSERMAN: But we were in this courtroom and
16 I pledged not to make a distribution for six weeks, and at
17 that point we were all focused on that issue. It was at
18 that time -- maybe I misunderstood the scope of Your Honor's
19 ruling -- but it seemed to me at that time what occurred to
20 Mr. Kirshenbaum two days later should have been readily
21 apparent when we were all here, which is Judge, by the way,
22 we appreciate the fact that Mr. Wasserman is pledging not to
23 make the distribution and has given his word, there's
24 discovery we need in connection with that.

25 MR. KIRSHENBAUM: And we filed the motion on an

1 expedited basis, Your Honor, two days later -- two days
2 later and they asked for more time, they asked for three
3 weeks. And so we're nice enough to give him the three
4 weeks. Okay, he didn't say anything we must distribute
5 before year's end, he said nothing about any tax imperatives
6 to distribute before year's end. That, Your Honor, is
7 keeping something under his hat. Because if he had said on
8 September 30, Judge, we are absolutely going to distribute
9 before year's end, we're going to -- I would not have given
10 him three weeks. I was in here two days later on an
11 expedited basis. I got an expedited date. They asked for
12 three weeks and I gave them the three weeks, and, Your
13 Honor, I gave them to three weeks on the agreement that they
14 would not even be given notice for an additional three weeks
15 after that, and they're silent on that, and basically
16 they're saying, Kirshenbaum, you're a sucker, and that's
17 exactly what they're saying.

18 You're a nice guy, you filed the motion on --
19 whatever day in October it was, they would have been in
20 here, Your Honor, four weeks ago, five weeks ago, and I
21 could have pressed this four or five weeks ago. They asked
22 for more time, I gave them more time. They said nothing
23 about an imperative -- to distribute before year's end for
24 tax reasons, which generally speaking, Your Honor, is a lot
25 of nonsense.

1 THE COURT: Well suffice it to say that they did
2 say that they had a stated intention of distributing before
3 year-end.

4 MR. KIRSHENBAUM: Okay.

5 THE COURT: Whether it's for tax purposes or for
6 whatever purposes Mr. Wasserman has stated that BARM intends
7 to make a distribution before year-end and he stated that he
8 would submit a proposal with respect to setting up a reserve
9 to assure that the distribution doesn't have an economic
10 effect -- this is based on his proposal and what his stated
11 intention is -- would not have an economic effect on
12 Mr. Rosenberg, Mr. Kessler, and the Borgata.

13 And as I said, this colloquy started because I
14 raised the issue, I didn't want this to be a futile exercise
15 if you were going to be moving immediately for injunctive
16 relief or such other relief to bar the distribution by BARM
17 and then suddenly we're thrust into having discovery under
18 the Federal Rules of Civil Procedure.

19 MR. KIRSHENBAUM: Again, Your Honor, I don't know.
20 If I get my 2004 discovery, okay, and if they make a motion
21 to -- if they give notice to distribute I have my -- I've
22 had my 2004 discovery, I don't need then to start going
23 under the Federal Rules of Civil Procedure. I have the
24 information and I either have the information sufficient to
25 come to this court or the District Court to get an

1 injunction while the action is pending or I don't.

2 They will also have an opportunity then, Your
3 Honor, in connection with that, which -- and of course
4 whenever you're talking about a temporary restraining order
5 or preliminary injunction there's also -- you know, I have
6 an issue of burden and then there's a balancing of the
7 equities, rather than simply the buzz word "tax
8 considerations." They'll be able to come to the Court and
9 they will be able to make their case as to why it may really
10 be imperative to distribute before year's end or whether
11 there's really nothing to that at all. And then the Court
12 will make a determination balancing the equities.

13 If I had my 2004 examination, if I have the
14 documents myself and -- I and my colleagues we can make a
15 determination as to whether we want to try to block and we
16 will -- and if we decide to do that, Your Honor, we will
17 then use the documentation presumably that we obtain during
18 2004 in order to do that. And we'll either make the case or
19 we won't.

20 And if it comes to this, Your Honor, if
21 Mr. Wasserman wants to take the position that they did not
22 make a commitment and the extension was not given on the
23 basis that they would not give the notice to the Court for
24 at least a three-week period then we'll come -- we'll have a
25 hearing on that too. Because I think you will see, Your

1 Honor, that this is one sided hand after another, and this
2 is very, very unfair. It's very unfair. What we're trying
3 to do is simply level the playing field.

4 Again, I would never -- I can't imagine what must
5 be in these documents that they would not have given me
6 these documents on October 2nd. If they knew -- if they
7 knew they wanted to distribute why would they do this? Why
8 would they do this? They wanted to have tax consideration?
9 On October 2nd I asked them, I delineated eight categories
10 of documents, give them to me on the 3rd.

11 To refuse to give them to me, to ignore it and now
12 say too late, that's just not the way things happen. Not in
13 this court, Your Honor, not in any court, and it's totally
14 unfair. It would be totally unfair. It would be -- it
15 would be a potential tremendous abridgment of everyone
16 else's rights, and we don't know the universe of creditors,
17 we don't know. The fact that he says there are no other
18 creditors, the fact that he says I'm speaking to Canadian
19 northern and they say some of this stuff is theirs, I mean
20 it's like they're simply taking the pie and they're deciding
21 how to divide it up.

22 We're in the Bankruptcy Court, we're in front of
23 the United States bankruptcy judge, Mr. United States
24 bankruptcy judge you don't have to bother yourself with any
25 of this stuff. The creditors who are concerned about this

1 we'll just throw in enough money for them. That's not the
2 way the process works. That's just not the way the process
3 works.

4 Your Honor, I with utmost respect I would urge the
5 Court to enter an order giving us to right to take the 2004
6 discovery, I will -- I will endeavor to get that stuff and
7 work very quickly, I am not looking for delay. None of us
8 are looking for delay, but we are looking for fairness, and
9 we are looking for the opportunity to understand the record.
10 And if they're not hiding anything, Your Honor, they should
11 be -- they should be at my doorstep or inviting me to their
12 doorstep later today with all the documents. Here, come in,
13 look, we have nothing to hide. Look 'til your hearts
14 content because you'll find nothing.

15 THE COURT: I thank --

16 MR. KIRSHENBAUM: I don't want to waste my client
17 -- I'm not looking to waste my client's money, but I am
18 looking, Your Honor, for fairness, I am looking for due
19 process.

20 THE COURT: Thank you.

21 MR. WASSERMAN: Your Honor --

22 THE COURT: I saw that Mr. Wasserman jumped up and
23 so I will give you one last opportunity before I rule on the
24 2004's. Is there something you need to say?

25 MR. WASSERMAN: I think at some point all argument

1 must come to an end, so I have nothing further.

2 THE COURT: Thank you. I appreciate that.

3 Mr. Jacob?

4 MR. JACOB: Your Honor, I sit here and I've
5 listened to all of this and if you'll indulge me for only
6 five minutes or less, but sometimes I hear things and I feel
7 I have to put them back in context.

8 We're all representing clients, I've been doing
9 this for almost 30 years, I have some gray hair, you do too,
10 we've seen a lot of things.

11 Mr. Kirshenbaum, whatever his understanding was of
12 what happened before at the last hearing, he was here two
13 days later and he served us with his discovery motion one
14 hour before the Jewish holiday, okay? We were not able to
15 do anything Wednesday night, Thursday, Friday, Saturday. We
16 would have had to work Sunday and the answer was due again,
17 I believe either Tuesday or Wednesday, those days were also
18 holidays, I was not working. Mr. Katz who works in it also
19 was observing. And the following Wednesday night is that
20 same holiday over again.

21 We asked him for time because he violated this
22 Court's rules of civility, okay?

23 MR. KIRSHENBAUM: Your Honor, I really --

24 THE COURT: Mr. Kirshenbaum, please.

25 MR. JACOB: Okay? We would never have done that.

1 THE COURT: Let him finish.

2 MR. KIRSHENBAUM: That's just --

3 THE COURT: Let him finish.

4 MR. JACOB: We would never have done that to
5 Mr. Kirshenbaum.

6 Mr. Kirshenbaum comes here and he makes half
7 statements, he makes representations.

8 You've heard today we put in our affidavits, we've
9 documented that net of everything our clients have lost more
10 than \$50 million, and that doesn't include money that we had
11 to add to stabilize some of these assets out of our clients'
12 pockets, which is another reason that some of our clients
13 want money back.

14 Mr. Kirshenbaum gets up and says things. I don't
15 know whether he knows that they're untrue or whether he just
16 doesn't know, but when he talks about Mr. Groman bringing in
17 \$46 million, and just to give you an example, and that maybe
18 some of that money was made earlier on legitimate
19 investments because he didn't lose it until the end, he
20 knows that Mr. Groman came in at the very end, only in 2010,
21 and therefore, the reason that his losses occurred at the
22 end is because he didn't invest before then. I assume
23 Mr. Kirshenbaum knows that because his client is one of the
24 people who introduced Mr. Barkany to my client, Mr. Groman.
25 So he knows about all this. He gets up and makes these

1 statements to the Court.

2 And I don't take him up on 1 out of even 20 of
3 these statements, but ever so often I get up and say, I'm
4 not saying that he's lying, but he doesn't know what he's
5 talking about, and not everyone who doesn't know what he's
6 talking about is entitled to a 2004 order.

7 So, we'll leave it up to you. We propose the
8 reasonable proposal, we're ready to protect
9 Mr. Kirshenbaum's clients, the petitioners.

10 Mr. Kirshenbaum has yet to level with this Court.
11 We heard today about another client. He has yet other
12 clients. He had not yet told this Court about all the
13 clients he represents, and maybe we'll bring that issue
14 before the Court, but we've made a proposal to protect him.

15 He keeps on coming here and asking to protect
16 people. We don't know whether he does represent them,
17 whether he doesn't represent them, we've made a proposal
18 that's reasonable to protect his clients. We made a
19 proposal that would allow them to get percentage wise more
20 money than we're proposing to pay our own clients. Somehow
21 it's not enough that his clients are protected, because as
22 my partner, Mr. Wasserman, said, he is out to stop a
23 distribution.

24 We made a reasonable proposal and we would urge
25 Your Honor to deny this motion.

1 Thank you very much.

2 THE COURT: Thank you.

3 All right. With respect to the Rule 2004
4 examination requested by the petitioning creditors, based
5 upon the arguments advanced by both parties in their written
6 submissions and applicable case law and the record today,
7 the Court will grant the 2004 motion to the extent of
8 permitting the subpoena to be issued and providing the
9 opportunity of BARM to file a motion to quash that subpoena,
10 if they have grounds to do so, or to move for a protective
11 order, if they have grounds to do so, but I would urge that
12 the parties at least confer in good faith with respect to
13 any dispute over the production of the requested documents.
14 But the granting of the 2004 order does not in any way
15 abridge any rights of BARM to move as against that subpoena.

16 With respect to the submissions that would be
17 coming in on the 20th, right? The 20th, the Court will
18 review that, and then we may have to adjust our timing and
19 our schedule with respect to hearing the issues on the
20 Borgata claim, but the Court will promptly let you know
21 whether or not we're going to keep the December 15th date.

22 To the extent that the parties are unable to
23 resolve any issues with respect to the subpoena the Court
24 then would have to hold a hearing on that -- on that
25 particular dispute.

1 MR. JANNUZZI: Would I -- I would be filing a
2 motion to quash in any event. The return date would be
3 fixed by the Court at a later date; is that correct?

4 THE COURT: Your motion to quash the subpoena with
5 Mr. Barkany, we'll have to select a date for that. We have
6 to look at our calendar. It may be that the 15th becomes a
7 day to deal with motions to quash and we have to move the
8 hearing with respect to the challenge of the Borgata claim
9 to a date off of the 15th. I'm a little reluctant to do
10 that, and we'll look at our schedule, only because that
11 means we're going to end up being pushed into January. But
12 we'll look at our schedule and do the best we can, not only
13 for ourselves, but also to accommodate the parties as well.

14 So with that said -- and I also want to return to
15 the point that we will hold the hearing on the Borgata claim
16 and the involuntary, and to the extent -- I just want to
17 make sure that everybody understands and continues to plan
18 their schedules -- to the extent that the Court enters an
19 order for relief in this bankruptcy case we are going to set
20 on a rather expedited timetable a hearing date on the motion
21 that was brought by BARM to dismiss the case.

22 So, I just want everyone to realize that as you're
23 projecting out with respect to schedules, to the extent that
24 the order for relief is entered by the Court after we go
25 through the issues on the Borgata claim and address certain

1 issues with respect to Rosenberg and Kessler, as I said,
2 should the order for relief be entered we want to address as
3 expeditiously as possible the motion to dismiss, because of
4 course that has a tremendous impact on this case, because a
5 trustee will be appointed once the order for relief is
6 entered, and we need to address that motion to dismiss as
7 promptly as possible.

8 MR. KIRSHENBAUM: Your Honor, may I just ask if --
9 and I will represent to the Court that we will file our --
10 we will serve our subpoena on BARM at the latest Monday, I
11 actually will try to do it tomorrow.

12 THE COURT: Well certainly you have to wait for us
13 to enter the order, but --

14 MR. KIRSHENBAUM: Oh, okay.

15 THE COURT: -- once we enter the order then you
16 would have to authority to issue the subpoena. But as I
17 said --

18 MR. KIRSHENBAUM: Right.

19 THE COURT: -- they're going to have an
20 opportunity to address that subpoena.

21 MR. KIRSHENBAUM: Will the order -- Your Honor, if
22 I may -- if I may inquire, will the order actually set, you
23 know, timing in terms of giving them a certain period of
24 time to -- okay, thanks.

25 THE COURT: Yes.

1 MR. KIRSHENBAUM: Okay.

2 THE COURT: The order will specify the time period
3 for BARM.

4 MR. KIRSHENBAUM: Okay. And then I guess
5 presumably also set up a further -- if we need further -- a
6 hearing on it, so that'll all be within the framework of the
7 order?

8 THE COURT: Well it won't be in the framework of
9 the order, we'll set up a timetable for BARM and it'll be a
10 reasonable period of time for them to address the laundry
11 list of documents that has been requested, we'll set up a
12 reasonable period of time for them to address the subpoena.
13 To the extent the parties can't agree then we would have a
14 hearing to determine any motion to quash or motion for
15 protective order that BARM would bring. But that hearing
16 date won't be built into the 2004 order that's issued, that
17 hearing date would be subsequent when BARM, should they file
18 a motion to quash or a motion for a protective order or
19 whatever other relief they would seek, they would contact
20 the Court and we would give them the hearing date.

21 MS. LEVINE-SHAPIRO: Your Honor, I know we've been
22 here for a really long time, I just want to clarify one
23 thing very quickly.

24 You mentioned just a few minutes -- a few seconds
25 ago even, that you're revisiting the issues with regard to

1 Rosenberg and Kessler. My understanding is that there were
2 no issues regarding Mr. Kessler's petition.

3 THE COURT: There was no issue with respect to an
4 objection --

5 MS. LEVINE-SHAPIRO: Yes.

6 THE COURT: -- to the -- there was no challenge to
7 the claim of Mr. Kessler, but there was also the issue as to
8 whether or not BARM had standing with respect to Rosenberg,
9 and also we have that issue that we're briefing for next
10 week.

11 But yes, there was not a challenge to the claim
12 that was asserted by Mr. Kessler in the involuntary
13 petition. I'm correct on -- my memory is correct, right?
14 Was there a challenge to Mr. Kessler's claim? I know you
15 were seeking --

16 MR. JACOB: Absolutely -- we do not believe -- we
17 believe that not only is there not a bona fide dispute, we
18 believe that Mr. Kessler is not owed money, that he owes us
19 money.

20 MS. LEVINE-SHAPIRO: But you wish to ignore --

21 MR. JACOB: And we believe that Mr. Kessler's
22 instrument by which he understands he is asserting a claim
23 that is the basis for the petition is an insufficient basis
24 for being the petitioner.

25 THE COURT: Right. So -- I'm sorry, to interrupt

1 you.

2 So in your objection, when you filed the objection
3 to the involuntary you filed an objection to both
4 Rosenberg's -- Mr. Rosenberg's claim and Mr. Kessler's
5 claim.

6 MR. JACOB: Correct.

7 THE COURT: All right. Thank you.

8 MR. WASSERMAN: My recollection is, and someone
9 will correct me if I'm wrong. We filed with respect -- you
10 know what, I'll sit down.

11 Thank you, Your Honor.

12 THE COURT: That's great.

13 MR. KIRSHENBAUM: Your Honor, I just wanted to --

14 MR. WASSERMAN: No.

15 MR. KIRSHENBAUM: I just wanted to note, I think
16 what happened was that Your Honor -- Your Honor opined at
17 the end of the -- two hearings ago that, you know, that an
18 issue had been raised in terms of Barkany's ability to deal
19 with the father-in-law's claims --

20 THE COURT: Yes, the whole standing.

21 MR. KIRSHENBAUM: -- but not Kessler.

22 THE COURT: Right. The whole standing issue.

23 Mr. Barkany, you know, objected obviously to the Borgata
24 claim, the argument was made that for familiar relationship
25 -- familial relationships he did not object to the claim of

1 Mr. Rosenthal, but Mr. Barkany himself did not object to --

2 MR. KIRSHENBAUM: Correct.

3 THE COURT: -- the claim or challenge the claim --

4 MR. KIRSHENBAUM: Right.

5 THE COURT: -- of Mr. Kessler. That challenge was
6 made by BARM.

7 MR. KIRSHENBAUM: Right, you differentiated
8 between the potentially Rosenberg as the father-in-law and
9 maybe there's some -- as a practical matter, practical
10 impediment which would allow them to argue as opposed to
11 Kessler where there was no -- if the debtor felt there was a
12 basis to challenge, you know, the debtor would challenge.
13 And so Your Honor did not -- Your Honor basically ruled that
14 there was no reason to deviate from the general rule that
15 only the debtor would have the right to challenge the
16 Kessler claim.

17 THE COURT: Right, but I will say that I did -- I
18 did find it curious that Mr. Barkany would object to the
19 Borgata claim based on information that he got from Belski
20 -- from Mr. Belski, but would not object to the claim or
21 challenge the claim of Kessler despite similar information
22 that he presumably got from Mr. Belski saying you don't owe
23 him any money. So it's just something that I took note of
24 and I was just curious about that, but that's something for
25 another day.

1 So is that it?

2 MR. JACOB: Yes, Your Honor.

3 THE COURT: Well thank you very much for your
4 patience, you have been here quite some time. And the Court
5 will let you know the timing of going forward with respect
6 to a hearing on the challenge of the Borgata claim and also
7 to the extent that there's going to be a return date on
8 motions to quash, the motion to quash the subpoena with
9 respect to Mr. Barkany, and a motion to quash or protective
10 order should BARM determine that's the path they wish to
11 take, we'll have to determine what those hearing dates are.

12 MR. JACOB: Thank you.

13 THE COURT: Mr. Kirshenbaum?

14 MR. KIRSHENBAUM: Yes, sir.

15 THE COURT: Since your motion has been granted you
16 can submit an order, but I will tell you that by in large
17 the Court issues its own form of 2004 order.

18 MR. KIRSHENBAUM: No, Your Honor, I -- I mean I'd
19 be happy to do that, I think we actually attached an order,
20 but I --

21 THE COURT: You did.

22 MR. KIRSHENBAUM: Your Honor --

23 THE COURT: As I mention --

24 MR. KIRSHENBAUM: Yeah.

25 THE COURT: -- as I mention, you know, it's our

1 policy not to have the 2004 order direct that these
2 documents be produced so then when the documents aren't
3 produced then there's a motion saying you violated the court
4 order. We find the better practice is party issue the
5 subpoena, let the other side have an opportunity to address
6 the subpoena. So we'll issue the 2004 order.

7 MR. KIRSHENBAUM: Thank you very much, Your Honor.

8 THE COURT: All right. Thank you.

9 (Whereupon these proceedings were concluded at 2:00
10 P.M.)

I N D E X

RULINGS

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Petitioning Creditors and Contingent		
Barkany Creditors Pursuant to Federal rule		
of Bankruptcy Procedure 2004, 9006 and 9016		
Directing Production of Documents by Barkany		
Asset Recovery and Management, LLC. Filed		
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Joseph Rosenberg (Entered: 10/08/2014) [57]	106	5

C E R T I F I C A T I O N

We, Sherri L. Breach and Dawn South, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sherri Breach

Digitally signed by Sherri Breach
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Sherri L. Breach

AAERT Certified Electronic Transcriber CERT*D-397

Dawn South

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Date: November 24, 2014

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